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SUPREME COURT, U.S.

NO. A-638
82-6080

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

THOMAS A. BAREFOOT,

Petitioner

V.

W. J. ESTELLE, JR., DIRECTOR
TEXAS DEPARTMENT OF CORRECTIONS,

Respondent

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Petitioner Thomas A. Barefoot files this Motion for Leave to Proceed in Forma Pauperis supported by his affidavit and for cause would show the following:

I

Petitioner was convicted and sentenced to death for the offense of capital murder on November 14, 1978.

The conviction was affirmed by the Court of Criminal Appeals of Texas, Barefoot v. State, 596 S.W.2d 875 (Tex.Cr.App.1980).

15

This Court denied certiorari, Cause No. 80-5320, on June 29, 1981.

Petitioner's state post-conviction remedies were denied without hearing or written opinion by the Texas trial and appellate courts on October 7, 1981.

On October 9, 1981, the United States District Court for the Western District of Texas, Austin Division, stayed petitioner's scheduled October 13, 1981, execution, and the cause was transto the Waco Division for further action.

An evidentiary hearing was conducted July 28, 1982. On November 12, 1982, the District Court filed findings of Fact and Conclusions of Law, denying Petitioner relief but granting a Certificate of Probable Cause and leave to proceed in forma pauperis. Petitoner gave timely notice of appeal to the United States Court of Appeals for the Fifth Circuit.

Upon respondent's motion, the District Court then dissolved the stay of execution and the state trial judge ordered that petitioner be executed on January 25, 1983.

Petitioner exhausted the available state remedies a second time, again without hearing or written opinion.

A Motion for Stay of Execution was filed in the Court of Appeals. On January 17, 1983, the court informed counsel to appear and argue on January 19, 1983. The Court of Appeals denied the stay of execution on January 20, 1983.

Petitioner then applied to this Court for a Stay of Execu-

tion. On January 24, 1983, the Court entered an Order treating the Application as a Petition for Writ of Certiorari before judgment and granted certiorari. An expedited briefing schedule was ordered.

Petititioner is a citizen of the United States of America. Because of his poverty, attested to in his attached affidavit, he is unable to pay costs or give security for costs in this cause. For these reasons, Petitioner prays that he be allowed to proceed in forma pauperis.

Respectfully submitted,

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Petitioner's lawyers

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

(A-638)

NO. 82-6080

THOMAS A. BAREFOOT,
Petitioner

versus

W. J. ESTELLE, JR., DIRECTOR
TEXAS DEPARTMENT OF CORRECTIONS,
Respondent

PETITIONER'S AFFIDAVIT OF POVERTY

Petitioner Thomas A. Barefoot, being duly sworn, did depose and say that he is an indigent person, totally without funds with which to pay the costs of preparing and filing a brief and appendix in furtherance of the petition for writ of certiorari before judgment granted by the Court in this cause. Petitioner owns no property and has no assets and has been in State custody since his arrest in this cause on August 9, 1978. Unless he is permitted to proceed in forma pauperis, the serious constitutional issues upon which this Court has granted certiorari will not be resolved.

THE STATE OF TEXAS

COUNTY OF McCLENNAN

BEFORE ME, the undersigned authority, on this day personally appeared THOMAS A. BAREFOOT who, being duly sworn, did depose and say that he is the Petitioner in Cause No. 82-6080, now pending in the Supreme Court of the United States; and that all matters of fact contained in the above Affidavit of Poverty are true.

Thomas A. Barefoot

Thomas A. Barefoot

SUBSCRIBED AND SWORN TO on this the 10th day of February, 1983, to certify which witness my hand and seal of office.

Mary Sullivan

Notary Public in and for the State of Texas.

My Commission expires on the 30 day of April, 1985.

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A. 638

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1982

THOMAS A. BAREFOOT,

Petitioner,

v.

W. J. ESTELLE, Director
Texas Department of Corrections,

Respondent.

APPLICATION FOR STAY OF EXECUTION

This is a federal habeas corpus proceeding in a death case. Relief against petitioner's execution, scheduled to take place between midnight and sunrise on Tuesday, January 25, 1983, was denied by the district court and the court of appeals below. Petitioner hereby applies for a stay of that execution pending filing and determination of a petition for certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit denying petitioner's application for a stay of execution.

This Court's certiorari jurisdiction reaches the case whether or not the court of appeals' decision of a stay is

treated as a "rendition of judgment." 28 U.S.C. § 1254(1).[1/] An alternative source of certiorari exists under 28 U.S.C. § 1651. See Maxwell v. Bishop, 385 U.S. 650 (1967); Burwell v. Teets, 350 U.S. 808 (1955). In any event, the decision below is final in every technical sense, see Cohen v. Beneficial Loan Corp., 337 U.S. 541 (1949), as well as having the absolute finality of death.

The question to be presented on certiorari is the appropriate standard for granting or denying a stay of execution when a death-sentenced federal habeas corpus petitioner presents a constitutional issue of first impression to a federal court of appeals. Here, despite the fact that petitioner challenged his capital sentence on a ground resolved by no prior decision of this Court or of the Fifth Circuit -- a ground on which petitioner could point to both decisions of other courts and an extensive legal literature supporting him -- his claim was finally adjudicated in a couple of days of rushed stay proceedings, with manifestly inadequate time for study or deliberation by the court of appeals, instead of being considered in the orderly and measured manner in which any other claim of equal dignity would be considered by a federal court.

If this had been a civil action raising an equally difficult and novel constitutional question with nominal damages at stake, petitioner would have had the opportuity for full briefing and oral argument on the merits in the court of appeals. The court of appeals would predictably have taken more than one day to study the voluminous record. It would have received

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1/ Since the district court granted a certificate of probable cause to appeal in this case (28 U.S.C. § 2253), and since the court of appeals has not dismissed that appeal or summarily affirmed the denial of habeas corpus relief, petitioner's appeal is still technically pending before the court of appeals.

an amicus brief supporting petitioner on behalf of the American Psychiatric Association -- a brief that would have disabused it of the view which the unbriefed court of appeals thought that "[t]he majority of psychiatric experts accept," opinion of the court of appeals, Appendix A, infra, at 7. It would, in short, have addressed the issues presented in the deliberate and reflective fashion that regularly characterizes federal appellate review. But because petitioner's life is at stake -- and with no showing or credible profession by the State of Texas that the State would be prejudiced by postponing his excecution for the time necessary to permit an adequate study of those issues by the court of appeals -- petitioner is denied all of these things.

We submit that this is no way to handle death cases. It delivers neither justice nor the appearance of justice. Cf. Gardner v. Florida, 430 U.S. 349, 357-58, 359-60 (1977) (plurality opinion). It harries judges unnecessarily and treats litigants unfairly. It fecklessly burdens this Court with hurried stay applications like the present one. Before this becomes standard operating procedure for the processing of capital habeas corpus appeals in the Fifth Circuit and perhaps elsewhere, this Court should consider its propriety. Petitioner's execution should be stayed and certiorari should be granted to examine the question whether the court of appeals applied proper standards in its denial of a stay.

I

The issues upon which the stay of execution was requested in the court of appeals are set forth in petitioner's Motion for Stay of Execution to that court, a two-volume document which is being submitted to this Court herewith. The larger

of these two volumes contains the Motion itself plus an Appendix consisting of eleven exhibits (labled "A" through "K"); the smaller volume, entitled "Exhibits on Motion for Stay of Execution," contains four additional exhibits (labeled "1" through "4") also submitted to the court of appeals. The opinion of the court of appeals denying the stay is annexed hereto as Appendix A.

II

Briefly stated, the history of the court of appeals' consideration of petitioner's stay application was as follows:

The application was filed on Friday, January 14, 1983. At approximately 3 P.M. on Monday, January 17, the court scheduled oral argument on the application for Wednesday, January 19 at 9:00 A.M., in Houston, Texas, before a panel of Judges John R. Brown, Thomas M. Reavley, and E. Grady Jolly. On Tuesday, January 18, the State's papers in opposition to the stay were filed.

On the morning of Wednesday, January 19, Judge Brown was unavailable due to illness and was replaced on the panel by Judge Carolyn D. Randall. Judge Reavley advised counsel for both sides in open court that Judge Randall had not yet seen any of the papers filed. Oral argument took place on January 19 between approximately 9:30 A.M. and 11:00 A.M.

At oral argument, counsel for respondent submitted a copy of the transcript of the habeas corpus hearing conducted in the district court on July 28, 1982,[2/] and counsel for

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2/ The stenographer's certification indicates that this transcript was finally completed on January 14, 1983. It had not been made available to petitioner's counsel prior to oral argument on the stay application. A representative of petitioner's counsel in Austin, Texas obtained a copy from the Texas Attorney General's office on the afternoon of January 20, after the court of appeals had denied the stay; the transcript is now en route to the court via Federal Express and is scheduled to arrive at 10:30 A.M. on January 21. We are advised that the transcript is approximately 260 pages long.

petitioner submitted his "Exhibits on Motion for Stay of Execution" containing the four additional exhibits labeled "1" through "4". After oral argument on January 19, at approximately 12:10 P.M., the court was provided with a copy of the stenographic record of petitioner's state court trial and sentencing hearing. This record is approximately 1400 pages long.

At about 1 P.M. the following day, Thursday, January 20, the court of appeals issued its 16-page opinion denying a stay of execution.

III

The Fifth Circuit's denial of a stay of execution presents a manifestly substantial issue for review on certiorari by this Court. A stay should be granted to permit that review.

A

The court of appeals in this case has extended its recent decision in Brooks v. Estelle[3/] to hold that constitutional issues of first impression which are manifestly not frivolous may nonetheless be rejected summarily upon a motion for a stay of execution.

Petitioner contended below that the "hypothetical" testimony of psychiatrists James P. Grigson and John Holbrook predicting petitioner's long-term future dangerousness violated his rights under the Eighth and Fourteenth Amendments. An abudance of legal and psychiatric literature, summarized for this Court by the American Psychiatric Association in Point I of its amicus curiae brief in Estelle v. Smith (No. 79-1127), supports petitioner's position. A copy of that Point of the Association's amicus brief in Smith is annexed hereto as Appendix B.

3/ No. 82-1613, Nov. 26, 1982; motion for reconsideration denied, Dec. 6, 1982.

The American Psychiatric Association itself supports that position, as the Smith amicus brief clearly reflects. See also the Draft Report of the Association's Task Force on the Role of Psychiatry in the Sentencing Process (Exhibit G to petitioner's stay application below), recently approved by the Association, specifically criticizing the sort of psychiatric testimony presented for the prosecution in this case -- i.e., "hypothetical" predictions of long-term future dangerousness, made without examining the defendant -- as being "fraught with the possibility of error." Id. at 32. The Association's counsel informed counsel for petitioner in the court of appeals that the Association was prepared to file an amicus curiae brief before that court, and the court of appeals was advised of the Association's intention (letter from Joseph N. Onek, Esq. to Will Gray, Esq., dated January 11, 1983, Exhibit H to petitioner's stay application below). The Association has advised counsel for petitioner that it is prepared to file an amicus curiae brief in support of his certiorari petition before this Court as well.

The Supreme Court of California has ruled in favor of the position advocated by petitioner in People v. Murtishaw, 175 Cal. Rptr. 738, 631 P.2d 446, 466-71 (1981). (A copy of the Murtishaw opinion appears in petitioner's Exhibits on Motion for Stay of Execution as Exhibit 3.) Only recently a federal district court in Houston, Texas expressed a similar viewpoint in White v. Estelle, ___ F.Supp. ___, Civil Action No. H-81-1661 (S.D. Tex. Dec. 30, 1982). See petitioner's Motion for Stay of Execution below at 18 and Exhibit I. The Texas Attorney General has stated flatly that the decision in this case "is in conflict with" White. See petitioner's Exhibits on Motion for Stay of Execution below, Exhibit 4

(Respondent's Motion for New Trial in White.)[4] The panel of the Fifth Circuit that decided Smith also expressed similar sentiments. See Smith v. Estelle, 602 F.2d 694, 699-701 n.7 (5th Cir. 1979).

But the issue now before this Court is not whether these authorities are right or wrong. The issue is simply whether a constitutional claim which has attracted such authority on its side may be dismissed in a death case as insubstantial, without full briefing, oral argument on the merits, and reasoned consideration of the impressive body of case law and psychiatric authority which supports the claim. No decisions of this Court or of the Fifth Circuit come near rejecting petitioner's claim. The decision below rejects it only by the most tenuous extrapolations from Jurek v. Texas, 428 U.S. 262 (1976) and Estelle v. Smith, 451 U.S. 455 (1981) -- cases which plainly do not speak to the question.[5]

That the court of appeals did not grasp the issue -- understandably enough, with thousands of pages of papers in the case before it, and a 16-page opinion to write in little more

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4/ See also Gholson v. Estelle, Civil Action No. W-78-CA-68 (W.D. Tex. Oct. 31, 1979), slip op. at 6: "Although not necessary to the dispositon of the matter before it, the Court wishes to express its reservations about the validity of the conclusions reached by Drs.Holbrook and Grigson, as well as the relevancy of their testimony in deciding the special verdict questions under [Tex. Code Crim. Pro.] Article 37.071." The Texas Attorney General has conceded that in Gholson "the court found that psychiatric testimony of this type is so inherently unreliable that its very use violates the due process rights of capital defendants." Supplemental Brief for Appellant in Gholson v. Estelle, No. 79-3988, at 7. The court of appeals ultimately affirmed the district court's decision on other grounds. Gholson v. Estelle, 675 F.2d 734 (5th Cir. 1982).

5/ See opinion of the court of appeals, Appendix A, infra, at 9, contending that this Court "by implication" decided the issue in Jurek and Smith.

than a day -- is illustrated by its expression of concern that "if testimony by a mental health professional, trained to detect mental illness and personality types, is inherently unreliable on the issue of future dangerousness, then would not testimony and a decision by untutored lay persons on this issue be even more unreliable?" Appendix A at 10. As the American Psychiatric Association pointed out in its Smith amicus brief at 16 (see Appendix B), the prejudice to capital defendants lies in allowing psychiatrists to make predictions "with the mantle of professional expertise," with a "mystique" (id. at 17) that is extremely persuasive to juries even though it has absolutely no scientific basis. See People v. Murtishaw, supra, 631 P.2d at 476 ("the probative value of that testimony is far outweighed by its prejudicial impact"); White v. Estelle, supra, slip op. at 17 (a psychiatrist's "hypothetical" testimony without examination in this context "is not a professional, but a lay opinion [footnote omitted]. However, when this lay opinion is proferred by a witness bearing the title 'Doctor,' its impact on the jury is much greater than if it were not masquerading as something it is not.")

We respectfully submit that the refusal of the Fifth Circuit to grant a stay of execution under these circumstances presents an issue manifestly worthy of review on certiorari by this Court.

B

Petitioner also sought a stay of execution below based upon the recent admissions of Mrs. Mary Richards, one of the eyewitnesses called by the prosecutor to place petitioner near the scene of the crime, that she had lied in her trial testimony and had done so with the knowledge of the prosecutor. The court of appeals resolved this issue by deciding that Mrs.

Richards' testimony "could not affect the determination of Barefoot's guilt." (Opinion of the court of appeals, Appendix A, at 14.) Such a ground of decision necessarily requires a thorough and searching review of the full record of petitioner's trial. Yet that record, which consumes roughly 1400 pages, was before the court of appeals for barely 24 hours prior to the issuance of its decision. We respectfully submit that no court can adequately review a record of that size in such a brief period of time.

Here again, measured and considered deliberation has been sacrificed under the pressures of an imminent execution date which the court of appeals declined to stay. Whether a court in a death case may substitute such unseemly haste for orderly appellate procedure is an issue manifestly worthy of review on certiorari.6/

6/ The court of appeals' analysis of the record is deficient in several respects. For example, it neglects to note that the two Fort Hood soldiers who testified against petitioner (Appendix A at 14-15) gave statements to the authorities on the day of the crime describing an individual who did not look anything like petitioner. Both described a man 6' or 6' to 6'2" tall, clean shaven, and with a short military haircut. Statement of Facts (hereinafter "SF") at 1206-08, 1254. Petitioner is 5'4" tall, and had a mustache at the time of the offense (SF 1606). He had shaved off his mustache before his arrest the following day (ibid.), but a photo taken upon arrest clearly shows him to have long hair down to his shoulders. (SF 2262, State's Exhibit 41). One of the soldiers who subsequently identified petitioner at trial also conceded that he had seen petitioner's face several times in newspaper photogragphs and on television prior to picking his photo out of a photographic line-up before trial (SF at 1208, 1215).

Similarly, the court of appeals' description of the testimony of petitioner's psychiatric experts at the federal habeas corpus hearing (Appendix A at 7) is taken out of context and incomplete. As noted previously (see n.2, supra), the full transcript is en route to the Court and will be available for for its consideration on this application.

CONCLUSION

Because of the unique differences between execution and all other criminal sanctions, this Court

> has gone to extraordinary meassures to ensure that the prisoner sentenced to be executed is afforded process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudcice or mistake.

Eddings v. Oklahoma, 455 U.S. 104, 118 (1982) (concurring opinion of Justice O'Connor). Its insistence upon such "extraordinary measures" applies both to the determination that the defendant is guilty and to the determination that he deserves to die. Beck v. Alabama, 447 U.S. 625, 637-38 (1980); Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion); Gardner v. Florida, 430 U.S. 349, 357-58 (1977) (plurality opinion); id. 363-64 (concurring opinion of Justice White); Woodson v. North Carolina, 428 U.S. 280, 305 (plurality opinion). The decision below, hastily denying Thomas Barefoot a stay of execution to permit one full opportunity for federal habeas corpus review of substantial constitutional issues, plainly violates these principles. This Court should grant a stay of execution pending review of that decision on certiorari.

Respectfully submitted,

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U.S. COURT OF APPEALS
FILED
JAN 20 1983
GILBERT E. GANUCHEAU
CLERK

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS
RECEIVED
JAN 20 1983
NEW ORLEANS, LA.

No. 82-1680

THOMAS A. BAREFOOT,

Petitioner-Appellant,

v.

W. J. ESTELLE, JR., Director,
Texas Department of Corrections,

Respondent-Appellee.

Appeal from the United States District Court
for the Western District of Texas

(January 20 , 1983)

Before REAVLEY, RANDALL and JOLLY, Circuit Judges

PER CURIAM:

Thomas A. Barefoot was convicted in November, 1978 of murdering a Harker Heights police officer in Bell County, Texas on August 7, 1978.[1] The Court of Criminal Appeals of Texas affirmed the conviction on March 12, 1980 and denied rehearing on April 30, 1980. Barefoot v. State, 596 S.W.2d 875 (Tex. Crim. App. 1980). Barefoot was sentenced to die on September 17, 1980. The United States Supreme Court stayed execution and then dissolved the stay when certiorari was denied on June 29, 1981,

453 U.S. 913. Barefoot was again sentenced to die on October 13, 1981. The state district court denied habeas, as did the Court of Criminal Appeals. The federal district court then stayed the execution on October 9, 1981. After an evidentiary hearing, that federal court denied habeas corpus on November 11, 1982. The State of Texas moved to vacate the stay of execution and the court did vacate it on December 8, 1982. Because the district court granted certificate of probable cause, the denial of habeas is now on appeal in this court. Barefoot has now been resentenced and is to die before sunrise on January 25, 1983. Barefoot moves to stay execution of the sentence pending appeal.

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[1]The jury answered affirmatively to these questions of the Tex. Code of Crim. Ann. art. 37.071:

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.

Following the 1978 trial and conviction in Bell County, the Bell County District Court has reviewed the conviction on collateral attack, the Texas Court of Criminal Appeals has reviewed the conviction four times (once on direct appeal and three times on collateral attack), the Supreme Court of the United States has reviewed it on application for certiorari, and the federal district court has held an evidentiary hearing and --

after 14 months -- upheld the conviction.

1. The Nature of Our Decision

This panel has studied the briefs and record filed with us and has conducted a hearing on January 19, 1983, at which the petitioner's attorney was allowed unlimited time to discuss any matter germane to the decision before us.

That decision is a limited one. This court may interfere with the action of the State of Texas only upon a showing that the Constitution of the United States has been violated. Upon the question of whether to stay execution until the appeal has been processed, we consider the likelihood of success of that appeal. Ruiz v. Estelle, 650 F.2d 555 (5th Cir. 1981). There should be a substantial case on the merits of any serious legal question involved in the appeal to warrant staying the decision below. Ruiz v. Estelle, 666 F.2d 854, 857 (5th Cir. 1982). If after all these years of study, no constitutional imperfections of substance can be found, it becomes the duty of this court to deny the stay and refuse to interfere with the authorities of the State of Texas as they follow the laws of that state.

2. The Trial Court's Certificate of Probable Cause

We note that the district court's issuance of a certificate of probable cause bears upon our consideration here. In this circuit, "We have equated probable cause . . . to a 'substantial showing of the denial of [a] federal right.'" Stewart v. Beto, 454 F.2d 268, 270 n.2 (5th Cir. 1971), quoting Harris v. Ellis, 204 F.2d 685, 686 (5th Cir. 1953). And if the denial of a certificate by a district judge should be given "weighty consideration" by a circuit judge, Nowakowski v. Maroney, 386 U.S. 542, 543 (1967), then the granting of a certificate should be entitled to similar treatment. However, this does not relieve us of our duty under Fed. R. App. P. 8 to decide the issue for ourselves. To give too much weight to the district court's issuance of the certificate would be to give it preclusive effect on our determination of the stay issue. Rule 8 clearly contemplates that it is the appellate court's responsibility to decide the merits of the stay.[2]

[2]This preclusive effect is also inconsistent with the district court's denial of the stay in the first instance. The district court must have thought that appellant did not meet the requirements of a stay. Yet, if we gave the C.P.C. preclusive effect, then we would in effect be saying that its issuance means that the district court thought petitioner is entitled to a stay.

This court had the same question before it last month in Brooks v. Estelle, ___ F.2d ___. The stay was denied by this court and also by the Supreme Court. 51 U.S.L.W. 3469 (U.S. Dec. 6, 1982). Justices Brennan, Marshall and Stevens dissented from the denial of the stay. They argued that once a certificate of probable cause has been issued, the appellant "must then be afforded an opportunity to address the merits." Garrison v. Patterson, 391 U.S. 464, 466 (1968). See also Nowakowski v. Maroney, 386 U.S. 542, 543 (1967). ("When a district court grants a certificate of probable cause the court of appeals must . . . proceed to a disposition of the appeal in accord with its ordinary procedure.")

The simple response to this argument is that since six members of the Court denied the petition for stay, this argument must have been rejected. We respectfully suggest, however, that Nowakowski and Garrison are inapposite here. In Garrison, the court of appeals upon motion for a certificate of probable cause, simultaneously granted the certificate and, without argument on the merits or explanation of its reasons, affirmed the district court. Nowakowski dealt with a denial of leave to proceed in forma pauperis once the district court had granted a certificate of probable cause. The Court's concern was the attempt by the appellate court to circumvent the district court's power to grant a habeas petitioner an appeal.

Neither of these cases addressed a situation in which

the party had an opportunity to brief and argue the merits of the underlying issues, nor do they suggest that the stay procedure of Rule 8 is somehow abrogated by the granting of a certificate of probable cause. We think that this case is controlled by Carafas v. LaVallee, 29 U.S. 234 (1968), more than Garrison and Nowakowski. In Carafas, the Court, as in Nowakowski, reversed the second circuit's denial of leave to proceed in forma pauperis. The Court discussed Nowakowski and its implications. The Court stated:

> Nothing in the order entered by the Court of Appeals, however, indicates that the appeal was duly considered on its merits as Nowakowski requires in cases where a certificate of probable cause has been granted. Although Nowakowski does not necessarily require that the Court of Appeals give the parties full opportunity to submit briefs and argument in an appeal which, despite the issuance of the certificate of probable cause, is frivolous, enough must appear to demonstrate the basis for the court's summary action.

Id. at 242. Our actions here fall under this language. Petitioner's motion is directed solely to the merits. The parties have been also afforded an unlimited opporunity to make their contentions upon the underlying merits by briefs and oral argument. This opinion demonstrates the reasons for our decision. We think, therefore, that the arguments put forth by the dissenters in Brooks should not prevent us from denying this stay if there is an indisputable absence of merit to the petitioner's complaint.

3. Merits of Appeal: Psychiatric Testimony on Dangerousness

The sole issue that petitioner raises on appeal concerns testimony at the sentencing stage by two psychiatric experts regarding appellant's future dangerousness. Neither of these witnesses had interviewed petitioner, but testified on the basis of hypothetical questions. Petitioner argues that the admission of this testimony amounts to constitutional error.

The evidence before the federal district court supported its conclusion that the accuracy of psychiatric predictions of future dangerousness dramatically rises where there has been a pattern of repetitive assaultive and violent conduct. The majority of psychiatric experts accept that view. All of the experts have testified that the conduct of the petitioner, to which the assumed facts adhered in the hypothetical question put to the psychiatrists at the original trial, was the conduct of a severe sociopath. They disagreed over the degree of certainty with which future conduct could be predicted, but this only shows a difference of opinion among professionals - no rarity to the courts or to citizens who serve as jurors. We find no error of law or violation of the constitution in the admission into evidence of those opinions, the proper predicate having been laid.

Petitioner relies on Green v. Georgia, 442 U.S. 95 (1979), and Gardner v. Florida, 430 U.S. 349 (1977), for the proposition that the due process clause of the Fourteenth Amendment and the cruel and unusual punishment clause of the Eighth Amendment set limits upon the types of evidence that may be presented at a sentencing hearing. He then argues that the doctor's testimony is inherently unreliable. He asserts that the

inaccuracy in predicting future dangerousness, particularly when no interview has been conducted, requires that the testimony be excluded. He also argues that since the hypotheticals did not include the mitigating evidence, this increases the inaccuracy of the testimony and permits the jury to avoid consideration of the mitigating evidence by simply relying on the doctor's testimony that the accused was a sociopath who would commit future acts of violence.

In Gardner, the Court dealt with a death sentence in which the trial judge rejected the jury's recommendation of a life sentence on the basis of a confidential pre-sentence investigation report which was not disclosed to the accused. The opinions of the Court reflect a concern not for a specific evidentiary rule, but for the nature of the adversary system and the need for the accused and his counsel to be able to respond to this evidence.

In Green, the state court excluded evidence that the accused's codefendant had actually killed the victim. This evidence consisted of a hearsay statement by the codefendant to a friend. The Court reversed, stating:

> Regardless of whether the proffered testimony comes within Georgia's hearsay rule, under the facts of this case its exclusion constituted a violation of the Due Process Clause of the Fourteenth Amendment. The excluded testimony was highly relevant to a critical issue, in the punishment phase of the trial . . . (emphasis added)

442 U.S. at 97. We think that Green is limited to its facts, and certainly did not federalize the law of evidence. It does, however, indicate that certain egregious evidentiary errors may be redressed by the due process clause.

We think, however, that the Supreme Court has, by implication at least, approved of psychiatric testimony in cases such as these. In Jurek v. Texas, 428 U.S. 262 (1976), the Supreme Court rejected the argument that requiring the jury to predict future behavior is so vague and uncertain as to be meaningless. While the Court did not deal specifically with what types of evidence the jury may hear, the Court stated that a jury is equipped to make such a determination. The Court stated: "What is important is that the jury have all possible relevant information about the individual defendant . . .". Psychiatric testimony would clearly appear to be relevant to the jury's determination. The fact that such testimony may not always be totally accurate does not affect its relevance to the issue.

Further indication of the approval of psychiatric testimony is contained in Estelle v. Smith, ___ U.S. ___, 101 S.Ct. 1866 (1981). The Court dealt with whether the state could use psychiatric testimony at the sentencing stage when the testimony was based on an interview with the defendant and when (1) defendant's counsel was not notified and (2) the defendant was not warned of his right to remain silent. The Court held that this did violate the defendant's rights. The Court, however, went on to discuss the effect of its holding on the state's ability to prove dangerousness. The Court states:

> [U]nder the Texas capital sentencing procedure, the inquiry necessary for the jury's resolution of the future dangerousness issue is in no sense confined to the province of psychiatric experts. . . .

___ U.S. at ___, 101 S.Ct. at 1878. The Court went on, saying

> While in no sense disapproving the use of psychiatric testimony bearing on the issue of future dangerousness, the holding in Jurek was guided by recognition that the inquiry mandated by Texas law does not require resort to medical experts.

Id. These statements indicate that expert testimony meets constitutional requirements for admissibility.

Petitioner argues that the Court was addressing the facts of Smith, where the psychiatrist had interviewed the defendant. But there is no indication in Smith that the discussion regarding psychiatric testimony was limited to testimony based on personal interviews. More importantly, we think to reject such testimony would be inconsistent with Smith and Jurek. In Smith the Court held that the state could not compel the defendant to submit to a psychiatric interview. Thus, were we to hold that a psychiatrist (or other mental health professional) could not testify on the basis of hypotheticals or an examination of the defendant's record, we would be giving the defendant the right to prevent any and all psychiatric testimony on the issue of dangerousness except psychiatric testimony in his own favor. We think this is inconsistent with the aim approved in Jurek that "the jury have before it all relevant information." In addition, we note that if testimony by a mental health professional, trained to detect mental illness and personality types, is inherently unreliable on the issue of future dangerousness, then would not testimony and a decision by untutored lay persons on this issue be even more unreliable? The Supreme Court thinks otherwise as was shown in Jurek and Smith in holding that the jury could decide the issue and the inquiry mandated by Texas law does not require resort to medical experts." 101 S.Ct. at 1878.

4. Jurisdiction of State Court to Resentence

While the present appeal to this court was pending, the

state district court set petitioner's execution date. Petitioner argued to the state court, the Court of Criminal Appeals and now before this court, that while this appeal is pending, the state court has no jurisdiction to resentence. Alternatively, he argues that if the state courts do have jurisdiction, then he is being denied equal protection of the laws because the Texas courts are closed to him.

These arguments have no merit. The first argument is actually a state law issue which we do not have the power to address in a habeas proceeding. Petitioner's second argument is based on Ex Parte Powers, 487 S.W.2d 101 (Tex. Crim. App. 1972), Ex Parte Green, 548 S.W.2d 914 (Tex. Crim. App. 1977), and Ex Parte McNeil, 588 S.W.2d 592 (Tex. Crim. App. 1979) (en banc). These cases stand for the proposition that

> A petitioner must decide which forum he will proceed in, because this Court will not, and a trial court in this State should not, consider a petitioner's application so long as the federal courts retain jurisdiction of the same matter.

Green, 548 S.W.2d at 916. We recently discussed this rule in depth, describing it as a rule of habeas abstention based on comity. Carter v. Estelle, 677 F.2d 427 (5th Cir. 1982). We do not see how these cases have any application to this case. This rule is one of judicial efficiency which merely prevents the petitioner from litigating the same habeas issues in two forums at the same time. Setting an execution date is clearly not a habeas suit. It is a collateral matter that is not part of the

habeas suit. Such a rule would allow petitioner to suspend his sentencing whatever the lack of merit and entitlement to stay. We therefore reject this argument.

5. Newly Discovered Evidence: Mary Richards

Petitioner fortells grounds for another try at habeas relief because of "newly discovered evidence." Petitioner's attorney interrogated Mary Richards under oath a few weeks ago, without the presence of a representative of the state, and her answers are said to conflict with her testimony for the state at Barefoot's trial and to raise questions of prosecutorial misconduct. We have before us the recent statement of Richards as well as her trial testimony.

Richards lived in the area where the killing occurred. She testified at the trial that she heard two shots that night and, when she looked out her window, she saw a man run by who resembled Barefoot. She now says that it could not have been Barefoot, because the hair and height and build of the two men differed. She says that she has always told everyone who interrogated her, including the investigator who worked for the attorneys defending Barefoot, and everybody she knows, about the true appearance of the man she saw. She explains her testimony at trial on the grounds that it was Barefoot's eye area that resembled the man she had seen and, further, that her testimony was false because an assistant district attorney and his investigator frightened her by telling her Barefoot intended to kill everyone in the office where she worked and that she should just answer the questions "yes" or "no."

It is difficult to accept this current statement of Richards. No rational prosecutor would have called her as a

witness if she had told him what she now says she did. Her testimony was not important, to begin with. Her testimony of hearing two shots raised an inconsistency, because the other evidence, including that of an eye witness to the shooting, was that only one shot was fired. With the strong identification of Barefoot by the other witnesses, to place Mary Richards on the stand if she thought she had seen a different man, would have only contributed another inconsistency. No attorney would have thought she could survive non-leading direct testimony and the cross-examination with only "yes" or "no." If she had told "everybody" and the investigator for the defense of her description of the man she saw, as she now says she did, that would have been played to the hilt by the defense.

Nevertheless, the testimony of Mary Richards, one way or the other, cannot and could not affect the determination of Barefoot's guilt. His presence on the scene was clearly established, as was his guilt. He admitted (actually, boasted of) his guilt to his friends. The gun which fired the fatal shot was in his pocket when he was arrested. He had told others in advance that he planned to kill the Harker Heights policeman and that he was to commit a robbery after creating a diversion by setting fire to a building. A roommate testified that he dropped Barefoot off near the Silver Spur, a nightclub, at 5:00 am. A Fort Hood soldier saw a man, whom he identified at trial as Barefoot, standing in the parking lot of the Silver Spur watching the

building burn. After reporting the fire, the soldier saw Barefoot again near Amy Lane. He told the officer this, and the officer drove his patrol car toward Amy Lane. Another soldier saw that officer get out of his car at the intersection of Amy Lane and Valley Road. A man wearing a white T-shirt and blue jeans, as Barefoot was dressed, stepped out of the bushes, walked to the officer and shot him in the head at point-blank range, and fled down Valley Road. (Mary Richards lived on Valley Road.)

Even if we were to assume for present purposes (and we would do so for no other purpose), that the prosecutor deliberately frightened Mary Richards to obtain her testimony and then sat by without disclosing that her testimony conflicted with her prior description, a reversal of the conviction would not be justified for the reason that the omitted evidence could not create a reasonable doubt of Barefoot's guilt, and the alleged prosecutorial conduct could not have an effect on the trial. See Smith v. Phillips, ____U.S.____, 102 S.Ct. 940 (1982); United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392 (1976).

This point has been raised and rejected by collateral attack in the Texas courts. There would be no justification for delay in order to have a further presentation in the federal courts.

6. Conclusion

This Court has had the benefit of the full trial court record except for a few exhibits unimportant to our considerations. We have read the arguments and materials filed by the parties. The petitioner is represented here, as he has been throughout the habeas corpus proceedings in state and federal courts, by a competent attorney experienced in this area of the law. We have heard full arguments in open court. Finding no patent substantial merit, or semblance thereof, to petitioner's constitutional objections, we must conclude and order that the motion for stay should be DENIED.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1127

W. J. ESTELLE, JR., Director,
Texas Department of Corrections,
Petitioner,

v.

ERNEST BENJAMIN SMITH,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE FOR THE AMERICAN PSYCHIATRIC ASSOCIATION

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I. THE USE OF PSYCHIATRIC TESTIMONY IN A CAPITAL CASE ON THE ISSUE OF WHETHER A DEFENDANT IS LIKELY TO COMMIT SERIOUS CRIMES IN THE FUTURE IS CONSTITUTIONALLY INVALID BECAUSE IT UNDERMINES THE RELIABILITY OF THE FACTFINDING PROCESS.

It is well recognized that the use of expert testimony in state prosecutions is traditionally a matter of state evidentiary law. *See* J. Wigmore, Treatise On Anglo-American System Of Evidence In Trials At Common Law § 6e (3d ed. 1940). Nevertheless, this Court has made clear that capital punishment cases are constitutionally "different," *Gardner* v. *Florida*, 430 U.S. 349, 357 (1977) (plurality opinion), and that it is of "vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." *Id.* at 358. "[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. . . . Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson* v. *North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion). In amicus' view the use of expert testimony on the issue of long-term future criminal behavior is inconsistent with these established principles.[9]

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[9] It should be made clear at the outset that amicus is urging a limited prohibition aimed only at *long-term* predictions of violence by psychiatrists. In Texas, the inquiry focuses on the defendant's lifetime, not on a discrete time period where psychiatric expertise might be more relevant. In civil commitment cases, for example, as this Court recognized last Term in *Addington* v. *Texas*, 441 U.S. 418 (1979), psychiatrists often can and do make reliable predictions about short-term prognoses, and such predictions often include potential violence. *See* Monaghan, *Prediction Research and the Emergency Commitment of Dangerous Mentally Ill Persons: A Re-*

As the court below recognized, "Dr. Grigson's testimony was extremely damaging to the defendant." 602 F.2d at 697. After detailing "his extensive [professional] qualifications," *id.*, Dr. Grigson proceeded to testify as a medical expert, using psychiatric nomenclature to describe Smith, and concluding that "certainly Mr. Smith is going to go ahead and commit other similar or same criminal acts if given the opportunity to do so." *Id.* at 698. Faced with this seemingly expert medical testimony, it is not surprising that the jury found that Smith was likely to commit serious criminal acts in the future even though he had no prior record of violent behavior. As this Court has observed, "since the members of a jury will have had little, if any, previous experience in sentencing, they are unlikely to be skilled in dealing with the information they are given." *Gregg* v. *Georgia*, 428 U.S. 153, 192 (1976) (plurality opinion).

Increasingly, psychiatrists have been asked, both in civil and criminal proceedings, to make a variety of long and short term assessments of a person's propensity to commit violent acts in the future. As a result, amicus has for many years been concerned with the question of psychiatric predictions of future violent behavior. In the early 1970's the American Psychiatric Association ap-

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consideration, 135 Amer. J. Psychiatry 198 (1978). In such situations the psychiatrist is able to evaluate the patient's current mental condition and to discern likely behavioral patterns, including potential violent behavior in the near future, if the illness remains untreated.

Similarly, amicus is not contending that psychiatrists should be prohibited from testifying on *all* issues at the penalty phase of a capital case. On the contrary, there are many issues, such as the defendant's mental state at the time of the crime or whether he acted under duress, that are well within the expertise of psychiatrists.

pointed a Task Force comprised of distinguished psychiatric experts with experience in the field of criminal behavior "to assemble the body of knowledge concerning the individual violent patient and the clinical issues surrounding his case." American Psychiatric Association Task Force on Clinical Aspects of the Violent Individual, *Clinical Aspects of the Violent Individual* at v (1974) (hereinafter "Task Force Report"). That Task Force submitted a report, "aimed at the practicing clinician," to "describe the current state of the art and [to] provide[] an overview of selected literature and clinical opinion on matters of evaluation, management, and prediction of violent behavior." *Id.* The Task Force focused its analysis on the violent patient—that is, the individual "who acts or has acted in such a way as to produce physical harm or destruction." *Id.* at 1.

The primary conclusion of this Task Force was that judgments as to the long-run potential for future violence and the "dangerousness" of a given individual are "fundamentally of very low reliability," primarily because such judgments are predictions of rare or infrequent events. *Id.* at 23. In some circumstances, of course, a clinician might be fairly confident that violent behavior would recur, as for example where a parent's past behavior clearly and repetitively evidences physical abuse of his or her children. But, as the Task Force noted, the relatively high degree of reliability in these cases is a function of knowing that the base rate of such behavior—that is, the rate of repetitive past violent acts—is very high for the person under scrutiny.[6] *Id.* "It

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[6] In this case, Smith had no history of committing harmful acts; his only prior conviction was for possession of marijuana. *See* Dix, *The Death Penalty, "Dangerousness," Psychiatric Testimony, and Professional Ethics*, 5 Am. J. Crim.

would not be necessary that the patient be 'mentally ill' or suffering from a psychiatric disorder in order to predict that such behavior will recur." *Id.* Thus, to the extent that a psychiatrist's prediction of "dangerousness" is based solely on this knowledge of base rates of behavior, his prediction involves no more "expertise"—and certainly no more "psychiatric expertise"—than does that of the average nonexpert.[7]

According to the Task Force, "the state of the art regarding predictions of violence is very unsatisfactory. The ability of psychiatrists or any other professionals to reliably predict future violence is unproved." *Id.* at 30. " '[D]angerousness' is neither a psychiatric nor a medical

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Law 151, 154 (1977). In view of this fact, it is apparent that Dr. Grigson's testimony that Smith would commit future harmful acts had no scientific basis whatsoever.

[7] One commentator has noted:

> "In an experimental study . . ., college students and psychiatrists agreed extensively on the degree of 'dangerousness' and 'nondangerousness' as indicated by various personality characteristics. This suggests the possibility that psychiatric judgment is not based upon any special knowledge or expertise beyond that of educated laymen. There are also several studies indicating that the diagnostic classifications made by psychologists are not more reliable or valid than those made by laymen."

R. Kirkland Schwitzgebel, "Prediction of Dangerousness and Its Implications For Treatment," in W.J. Curran, A.L. McGarry & C.S. Petty, Modern Legal Medicine, Psychiatry, and Forensic Medicine 786 (1980) (footnotes omitted). *See* A. Stone, Mental Health and Law: A System In Transition 33 (1975) ("There are . . . a group of patients in which anyone could predict dangerous acts; *e.g.*, drug addicts who regularly support their habit by mugging, but that prediction does not require a mental health professional.").

diagnosis, but involves issues of legal judgment and definition, as well as issues of social policy. Psychiatric expertise in the prediction of 'dangerousness' is not established and clinicians should avoid 'conclusory' judgments in this regard." *Id.* at 33.[8]

The professional literature on the issue of predictions of future criminal behavior was also reviewed and analyzed in a monograph published by the Center for Studies of Crime and Delinquency of the National Institute of Mental Health. A. Stone, Mental Health And Law: A System In Transition 27-36 (1975). That study similarly demonstrated that there are no reliable criteria for psychiatric predictions of long-term future criminal behavior. *Id.* at 29, *citing* S. Halleck, Psychiatry And The Dilemmas Of Crime 348 (1971); Stürup, "Will This Man Be Dangerous?," in De Reueck & Porter, The Mentally Abnormal Offender 17 (1968); Kozol, *et al.*, *The Diagnosis And Treatment of Dangerousness*, 18 Crime and Delinquency 371, 383 (1972). These conclusions are equally true today. Indeed, it has recently been noted that "the professional literature almost uniformly affirms low predictive accuracy with regard to the dangerousness of mental patients." R. Kirkland Schwitzgebel, "Prediction of Dangerousness and Its Implications for Treatment,"

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[8] A second important observation of the Task Force was that "psychiatrists, in order to be safe, too often predict dangerousness, especially in the case of the mentally ill offenders." Task Force Report at 25. *See* "Prediction of Dangerousness and Its Implications for Treatment," *supra* note 7, at 788 ("Mental health personnel rather consistently overpredict dangerousness.") This tendency toward false positive errors in prediction—that is, persons clinically predicted to be dangerous who are in fact not dangerous—has been attributed, at least in part, to "the strong negative reaction of the public to errors associated with the release of dangerous persons, whereas there is relatively little concern about unnecessary confinement." *Id.*

in W.J. Curran, A.L. McGarry, and C.S. Petty, Modern Legal Medicine, Psychiatry, and Forensic Medicine 784 (1980).*

In view of these findings, the use of psychiatric testimony on the issue of long-term future criminal behavior can only distort the factfinding process in a capital punishment trial. To the extent that there are important facts for a jury to consider on this issue—such as a defendant's history of violence—those facts, as in most criminal cases, can be fully presented by lay witnesses who do not testify with the mantle of professional expertise. Indeed this Court recognized as much in *Jurek*, where it upheld the use of the Texas criteria at issue here:

> "[P]rediction of future criminal conduct is an essential element in many of the decisions rendered throughout our criminal justice system. The decision whether to admit a defendant to bail, for instance, must often turn on a judge's prediction of the defendant's future conduct. And any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose. For those sentenced to prison, these same predictions must be made by parole authorities. The task that a Texas jury must perform in answering the statutory ques-

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* *See also* Diamond, *The Psychiatric Prediction of Dangerousness*, 123 U. Pa. L. Rev. 439 (1974); Ennis & Litwack, *Psychiatry and The Presumption of Expertise: Flipping Coins In The Courtroom*, 62 Calif. L. Rev. 693 (1974); Livermore, Malmquist & Meehl, *On The Justifications for Civil Commitment*, 117 U. Pa. L. Rev. 17 (1968); Steadman & Cocozza, *Psychiatry, Dangerousness, and The Repetitively Violent Offender*, 69 J. Crim. Law & Criminology, 226, 229-231 (1978); Wenk, Robinson & Smith, *Can Violence Be Predicted?* 18 Crime and Delinquency 393 (1972). *See also United States ex rel. Mathew v. Nelson*, 461 F.Supp. 707, 710 (N.D. Ill. 1978).

> tion in issue is thus basically no different from the task performed countless times each day throughout the American system of criminal justice." *Jurek* v. *Texas*, 428 U.S. 262, 275-276 (1976).

A prohibition against using expert testimony, then, will deny the jury no "possible relevant information about the individual defendant whose fate it must determine . . . ." *Id.* at 276. On the contrary, by sifting the mystique from the facts and leaving only the latter, it will help assure that a sentence of death is not the product of "wholly arbitrary and capricious action." *Gregg* v. *Georgia*, 428 U.S. 153, 189 (1976). The integrity of the criminal process demanded in a capital case will allow for no less.

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

WACO DIVISION

FILED
NOV 12 1982
CHARLES W. VAGNER, Clerk
By LW Deputy

THOMAS BAREFOOT	§	
	§	
v.	§	NO. W-81-CA-191
	§	
W. J. ESTELLE, JR.	§	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case was tried on July 28, 1982, before the Court. After hearing the testimony, exhibits and pleadings, and the arguments of counsel, the Court enters the following Findings of Fact and Conclusions of law:

FINDINGS OF FACT

1. This is a habeas corpus case brought by a state prisoner on death row under 28 U.S.C. 2254. Respondent has custody of Petitioner pursuant to a judgment and sentence of the 27th District Court of Bell County, Texas. Petitioner was indicted for the offense of capital murder. On November 14, 1978, Petitioner was tried before a jury which found him guilty of capital murder. The same jury answered two special issue questions on punishment in the affirmative, thus resulting in a sentence of death. Upon automatic appeal to the Texas Court of Criminal Appeals, the conviction was affirmed on June 2, 1980. Barefoot v. State, 596 S.W.2d 875 (Tex.Crim.App. 1980). Thereafter, Petitioner was sentenced to die by injection before sunrise on September 17, 1980.

App. A

2. On July 29, 1980, a stay of execution was granted by the Supreme Court of the United States pending the filing of a petition for writ of certiorari. The petition was filed in Cause No. 80-5320 on August 27, 1980, and on June 29, 1981, the petition was denied and the stay of execution was dissolved. On August 14, 1981, Petitioner was again sentenced to death by the trial court which set his execution sometime before sunrise on October 13, 1981.

3. Petitioner then filed an application for writ of habeas corpus in state court on September 29, 1981. This application was denied by the Texas Court of Criminal Appeals on October 7, 1981. On October 9, 1981, in this cause under No. A-81-CA-422, Petitioner's execution was stayed pending consideration of his application for writ of habeas corpus. This Court conducted an evidentiary hearing in this cause on July 28, 1982.

4. At the evidentiary hearing, Respondent was represented by Assistant Attorney General Douglas M. Becker. Petitioner was represented by his appointed counsel, Will Gray.

5. There are virtually no disputed facts relating to the issues raised by the parties in this case. The Pre-Trial Order signed by the parties lists but one contested material issue of fact: whether Petitioner's counsel at the time of trial understood Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770 (1968).

6. Essentially, Petitioner claims that one prospective juror, Ruby Sanders, was excluded in violation of Witherspoon and that his attorneys were ineffective for failing to object upon that basis. He contends that his attorneys were further ineffective because of their

lack of understanding of Witherspoon generally and because they allowed the voir dire to be conducted in such a manner as to deprive Petitioner of due process of law. He contends that the entirety of the voir dire examination produced a jury organized to return a death penalty in violation of Witherspoon v. Illinois, supra. Petitioner also complains of the use of hypothetical questions at the punishment phase of his trial. Two psychiatrists, neither of whom had examined Petitioner, testified on the basis of a lengthy hypothetical question that, in their opinion, if Petitioner were not given the death penalty, he would continue to commit future acts of violence that would pose a danger to society. Finally, Petitioner complains that Tex. Code Crim. Proc. Ann. Art. 37.071, is unconstitutional because it contains no provisions for directing the jury's consideration of mitigating cirucmstances.

7. Respondent denies each of these contentions. In addition, he asserts that Petitioner's complaints about the trial court's treatment of particular venirepersons was waived for Petitioner's failure to object at trial. Respondent further relies upon the presumption of correctness of state court findings of fact regarding this issue under Sumner v. Mata, 449 U.S. 559, 101 S.Ct. 764 (1981). Respondent also relies upon the state court findings of fact with respect to the quality of representation Petitioner received from his two appointed counsel. With respect to the use of psychiatric testimony, Respondent denies that such testimony is inherently unreliable and argues that Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2950 (1976), and Estelle v. Smith, 451 U.S. ____, 101 S.Ct. 1866 (1981), specifically endorse such

testimony. Respondent also alleges that for his failure to make proper objection at trial, Petitioner has procedurally defaulted this ground under Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497 (1977). Finally, Respondent relies upon Jurek v. Texas, supra, for the proposition that the Texas death penalty statute is constitutional.

8. The easiest issue will be dealt with first. The Texas capital sentencing procedure guides and focuses the jury's consideration of mitigating circumstances. In Jurek v. Texas, 478 U.S. 262, 272-73, 96 S.Ct. 2950, 2956-57 (1976), the United States Supreme Court held that "...the Texas capital sentencing procedure guides and focuses the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender before it can impose a sentence of death." Thus, even though the Texas capital sentencing procedure does not explicitly mention mitigating circumstances, the procedure in itself directs the jury's consideration to mitigating circumstances.

The record reflects that the trial court instructed the jury on puhishment as follows:

> You are further instructed that in determining each of these special issues you may take into consideration all of the evidence submitted to you in the full trial of the case, that is, all of the evidence submitted to you in the trial of the first phase of this case, wherein you were called upon to determine the guilt or innocence of the defendant, and all of the evidence, if any, admitted before you in the second phase of the trial, wherein you are called upon to determine the special issues hereby submitted to you (emphasis added).

This instruction provided for the jury's consideration of both mitigating and aggravating circumstances. The Texas Court of Criminal Appeals has often held that defendants in death penalty cases are

entitled to extremely wide latitude in submitting mitigating evidence to the jury. The Texas procedures have been upheld many times, both in the state and federal courts. Petitioner points to no evidence whatsoever that he was prevented from producing at the punishment phase of trial. He makes no complaint that he was precluded from arguing that the import of certain evidence was mitigating. In the absence of any such allegations, his claim is without merit, and must be denied. He makes a general complaint that the trial court's charge ought to have directed greater attention toward mitigating circumstances, but the jury was instructed to take into consideration all of the evidence in the trial. Moreover, Petitioner made no objection to the trial court's charge upon this basis at trial. Accordingly, any error was waived. Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497 (1977).

9. Petitioner also raises claims relating to the treatment of 44 venirepersons by the trial court and the conduct of his trial counsel in that regard. The complaint that Petitioner's appointed counsel, Gerald Brown and Stephen Blythe, were incompetent and did not understand Witherspoon is frivolous. Both attorneys testified before this Court at the evidentiary hearing in this cause. Each attorney is highly knowledgeable in criminal law. Mr. Brown is a Board Certified Specialist in the State of Texas in Criminal Law. Each attorney testified in depth that before voir dire examination began, and after consultation with a psychologist, a profile was constructed of the ideal juror from Petitioner BAREFOOT's point of view, relying particularly upon Brown's and Blythe's knowledge of local circumstances and conditions. A coherent plan for the use of peremptory

challenges was devised. The plan was modified in accordance with Petitioner BAREFOOT's animosity towards black and brown persons. There was a feeling that possibly Petitioner's animosity toward these persons might be communicated to them if they were selected for the jury. No person was rejected for services of juror by Petitioner's attorneys solely because he was black or brown, as they testified, but it was one additional factor in the equation. It was the Petitioner's request his attorneys consider this factor in that equation.

10. During voir dire examination, the attorneys consulted frequently and at length with their client. Decisions as to each prospective juror were reached mutually and after much discussion. Petitioner has complained that his attorneys failed to object to the exclusion of a great number of jurors who were not necessarily disqualified under Witherspoon. Since Brown and Blythe had retained their jury notes from trial, they refreshed their memory to some extent and were able to testify at the evidentiary hearing in detail as to the specific reasons, based upon trial strategy, as to why no objections were made to the exclusion of every single prospective juror about whom Petitioner had complained. Because a decision not to object to the exclusion of a juror was in every instance based upon reasonable strategy, Petitioner's asserted ground for relief must be rejected for that reason alone. The attorneys' strategy in every instance appears to this Court to have been a tactical decision based upon the attorneys' individualized knowledge of local conditions and circumstances and in conformance with the previously constructed juror profile.

11. Petitioner complains that venireperson Ruby Sanders was

qualified for jury service under Witherspoon and should not have been excluded. The following question and answer during voir dire examination indicate that Petitioner's allegation is without merit.

> "Q. And that's why we're asking you all these questions, Mrs. Sanders. Do you feel then that no matter what facts in any case might show that you, if you are on the jury, if someone forced you to be on a jury, that you could never vote in a case that would assess the death penalty on somebody because of what you believe and what you have already told me?
>
> "A. Yes, sir, that's right. I don't think that I can feel right even if I was on the jury and convicted an individual, I don't think that my conscience would allow me to continue to live on knowing that I am sentimental and believe in capital punishment or death or into this world." (emphasis added)

Since Mrs. Sanders testified she could never vote to assess a death penalty in any case, she was disqualified for jury service under Witherspoon. Moreover, the failure of Petitioner's counsel to object waived any error. Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497 (1977); Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978). The state court's finding on this matter is presumptively correct. Sumner v. Mata, 449 U.S. 559, 101 S.Ct. 764 (1981). At the evidentiary hearing in this cause, Petitioner's attorneys explained that even though they did not believe that Sanders was qualified for jury service under Witherspoon, there were additional, independent tactical reasons why they did not wish her to be on Petitioner's jury, even if she might have been rehabilitated. For these reasons, Petitioner does not satisfy the good cause exception of Wainwright v. Sykes. See also: Engle v. Isaac, Slip Op. No. 80-1430 (U.S., April 5, 1982).

12. Petitioner's allegation that the entire jury voir dire was fundamentally unfair and was organized to select a jury that would

return the death verdict in violation of Witherspoon is without merit. Respondent's Answer catalogs the venirepersons of whom Petitioner has complained. Of the 44 venirepersons of whom Petitioner complains, 28 were dismissed without objection. In five cases, Petitioner's motion to disqualify a juror was overruled. In eleven other cases, Petitioner does not object to the exclusion of a juror or the trial court's overruling his motion to exclude a juror, but objects instead to statements the prosecutor made without objection to such prospective jurors.

13. Regarding the first group of 28 jurors, many were excused for entirely innocuous reasons, such as an ill spouse or a job important to the welfare of the community, such as teaching public school, and often before any opinion as to the death penalty had been expressed. In most of these cases, defense counsel affirmatively agreed to the exclusion of such jurors and no objection was made to the exclusion of any of them. At the evidentiary hearing in this Court, Petitioner's trial attorneys were able to explain why they and Petitioner mutually agreed that they did not desire each of these jurors to be selected. No error is shown.

14. Next, Petitioner's motions to exclude five jurors, Korpiva, Baker, Walker, Latsha, and Smith, were rejected by the trial court. The Texas Court of Criminal Appeals dealt at length with Petitioner's motions to exclude Korpiva, Latsha, and Smith. Barefoot v. Smith, 596 S.W.2d 875, 881-86 (Tex.Crim.App. 1980) (en banc). None was subject to dismissal for reasons set forth therein. Moreover, this finding by the highest Texas appellate court of criminal jurisdiction is presumptively correct. Sumner v. Mata, supra.

15. Petitioner's objection to venireperson Baker was that he could not be fair because of overexposure to publicity concerning the case. In light of his unequivocal statement that he could be fair and impartial, Petitioner's motion to exclude him was meritless. Petitioner's objection to venireperson Walker was similarly without merit. Petitioner's complaint that Walker showed himself to be "patently committed to the death penalty" must be rejected in view of the lengthy rehabilitation by the prosecutor. Moreover, it does not appear that Petitioner ever renewed his objection following that rehabilitation; accordingly, it was procedurally defaulted. Wainwright v. Sykes, supra.

16. Additionally, Petitioner complains that the prosecutor misinformed 11 jurors as to the law. He has been unable, however, to specify any misstatements of law in the record. It appears that the prosecutor merely discussed the applicable law generally to such venirepersons. In the event any incidental misstatement of law was made, it does not approach the level of denial of due process of law. Moreover, Petitioner's attorneys did not object to any of such statements. Accordingly, Petitioner is procedurally defaulted under Wainwright v. Sykes, supra, from complaining about them now. Petitioner's attorneys also explained at the evidentiary hearing that, regarding an incidental misstatement, it is possible they might not have objected for one of several reasons. First, as a matter of strategy, they might have been interested in the juror's response to a particular question and felt that the question was not unduly prejudicial. Second, the prosecutor might have misstated the law in a matter

not prejudicial to Petitioner or, at most, neutral as to him. Attorneys are expected to exercise their professional judgment in choosing the proper time and subject to raise their objections.

17. Petitioner also complains about hypothetical questions posed to psychiatrists at the punishment phase of his trial. Upon careful reflection, this ground is without merit. In Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2950 (1976), and Estelle v. Smith, 451 U.S. ___, 101 S.Ct. 1866 (1981), the Supreme Court of the United States specifically upheld the predictive nature of the Texas capital punishment sentencing process, and further, specifically upheld the use of psychiatric testimony on the issue of future dangerousness as a matter that may be considered by the jury. The holding of those cases is that, although psychiatric testimony is valuable in assisting the jury in its consideration of future dangerousness, the Texas procedures quite properly are not limited to expert psychiatric testimony, but are also amenable to testimony by laypersons. In Jurek, supra, at 275-76, the Court stated:

> "[P]rediction of future criminal conduct is an essential element in many of the decisions rendered throughout our criminal justice system. The decision whether to admit a defendant to bail, for instance, must often turn on a judge's prediction of the defendant's future conduct. And any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose. For those sentenced to prison, those same predictions must be made by parole authorities. The task that a Texas jury must perform in answering the statutory question in issue is thus basically no different from the task performed countless times each day throughout the American system of criminal justice." (footnotes omitted)

Additionally, in Smith v. Estelle, supra, at 1878, the Supreme Court

stated, "While in no sense disapproving the use of psychiatric testimony bearing on the issue of future dangerousness, the holding in Jurek was guided by recognition that the inquiry mandated by Texas law does not require resort to medical experts."

18. The majority of psychiatric experts agree that where there is a pattern of repetitive assaultive and violent conduct, the accuracy of psychiatric predictions of future dangerousness dramatically rises.[1] The accuracy of this conclusion is reaffirmed by the expert medical testimony in this case at the evidentiary hearing. Dr. George Parker, a psychologist, testified for Respondent that professional literature indicates that predicting future dangerousness among random mental patients or even felons generally is not terribly accurate. The prediction of future dangerousness, however, becomes easier as the pattern and history of violence becomes more repetitively persuasive. Petitioner was diagnosed at trial as a sociopath, anti-social type, severe. Indeed, based upon the facts stated in the hypothetical question posed by the prosecutor at trial, all medical experts at the evidentiary hearing agreed with this diagnosis. Dr. Fred Fason, a psychiatrist who testified on behalf of Petitioner, testified that he was 90% sure that Petitioner was a severe anti-social sociopath who would commit future acts of violence dangerous to society. Dr. Wendell Dickerson, a psychologist, testified that he was almost 90% sure of the same decision. Dr. Richard Koons and Dr. Parker testified that they were extremely sure of the same conclusion.

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1. See: Amicus curiae brief of American Psychiatric Association in Estelle v. Smith, supra.

19. It would appear that Petitioner's complaint is not the diagnosis and prediction made by Drs. Holbrook and Grigson at the punishment phase of his trial, but that Dr. Grigson expressed extreme certainty in his diagnosis and prediction. Petitioner's experts have testified that such certainty is unsupportable in the medical profession. Moreover, Respondent's experts testified that they themselves could not be 100% sure in their diagnosis and prediction regarding Petitioner, but that they would be very close to completely certain.

20. In any event, the differences among the experts were quantitative, not qualitative. The differences in opinion go to the weight and not the admissibility of such testimony. The Court is unaware of any theory upon which the writ of habeas corpus may be granted or Petitioner's death penalty invalidated simply because an expert testified that he was competely certain rather than almost completely certain of a particular conclusion. Petitioner was not hampered in his cross-examination of the psychiatrists at trial. He was not precluded from presenting before the jury the identical testimony that he presented in the evidentiary hearing in this cause. Such disputes are within the province of the jury to resolve. Indeed, it is a fundamental premise of our entire system of criminal jurisprudence that the purpose of the jury is to sort out the true testimony from the false, the important matters from the unimportant matters, and, when called upon to do so, to give greater credence to one party's expert witnesses than another's. Such matters occur routinely in the American judicial system, both civil and criminal. If the

state psychiatrists at trial erred in being overconfident as to their diagnosis of Petitioner, then Petitioner should have presented impeaching evidence or rebuttal testimony. Petitioner is not entitled to relief on this ground of asserted error.

CONCLUSION OF LAW

1. The Petitioner is not in custody, or sentenced, in violation of the Constitution or laws or treaties of the United States.

The Court will enter judgment in accordance with these findings.

SIGNED and ENTERED this 9th day of November, 1982.

Lucius D. Bunton

LUCIUS D. BUNTON
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

WACO DIVISION

FILED
NOV 12 1982
CHARLES W. VAGNER, Clerk
By LW Deputy

THOMAS BAREFOOT	§	
	§	
v.	§	NO. W-81-CA-191
	§	
W. J. ESTELLE, JR.	§	

JUDGMENT

In accordance with this Court's Findings of Fact and Conclusions of Law heretofore entered,

IT IS ORDERED, ADJUDGED and DECREED that Petitioner take nothing in this action and that Judgment be entered for Respondent herein.

SIGNED and ENTERED this 9th day of November, 1982.

LUCIUS D. BUNTON
United States District Judge

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APPENDIX—Continued

can identify him or not, doesn't make any difference if he is fat, thin, tall, skinny or otherwise, if he can't identify him he can't and if he can, he can. That is the whole thing.

MR. DE LEON: Ask Mr. Keilmann if he was pointing at someone.

INTERPRETER: Were you pointing at someone, Mr. Keilmann?

MR. DE LEON: Just now.

INTERPRETER: Did you point to someone just now? He says, no.

MR. DE LEON: Ask him if the the [sic] man that he is pointing at is the man who pulled him out of the truck.

INTERPRETER: The man that you were pointing at, is that the man that pulled you out of the truck? The man that you just pointed at, is that the man that pulled you out of the truck? The man that you pointed at, is that the man that pulled you out of the truck? Yes.

MR. DE LEON: Ask him if it is the same man that you saw at the Finney Ranch?

INTERPRETER: Is that the same man you saw at the Finney's Ranch? He indicated, yes.

(WITNESS POINTING.)

MR. DE LEON: The man that he is pointing at, is that the one that he saw at the Finney Ranch?

INTERPRETER: The man that you were pointing at, is that the man you saw at the Finney's Ranch? He indicated, yes.

MR. DE LEON: Ask him if he is sure about it.

INTERPRETER: Are you sure Mr. Keilmann? He indicated, yes.

MR. DE LEON: Pass the witness, Your Honor.

. . . . .

CROSS EXAMINATION

. . . . .

MR. SCHARMEN: Mr. Keilmann is this the man you saw at the Finney Ranch?

INTERPRETER: He indicated, no.

MR. SCHARMEN: What was the answer?

INTERPRETER: No.

MR. SCHARMEN: Would you point to the man who you saw at the Finney Ranch?

INTERPRETER: You want me to tell him?

THE COURT: Tell him.

INTERPRETER: Point to the man you saw at the Finney Ranch. Point to the man you saw at the Finney Ranch. Point. Mr. Keilmann, can you point to the man that you saw at the Finney's Ranch? Which man?

MR. SCHARMEN: Let the record reflect that the witness pointed at this man standing to my right in the red jacket.

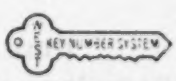
Let the record reflect the man pointed again to my left at the defendant.

THE COURT: I can't tell from my angle which way he is pointing, Counsel.

MR. DE LEON: Your Honor, the last time he pointed he pointed at the defendant.

MR. SCHARMEN: The first time he pointed at the man in the red jacket, Your Honor.

THE COURT: I am going to overrule both your objections. Let's proceed. Do you have any other questions you want to ask him? [sic]



Thomas A. BAREFOOT aka Darren Callier, Appellant,

v.

The STATE of Texas, Appellee.

No. 63715.

Court of Criminal Appeals of Texas, En Banc.

March 12, 1980.

Rehearing Denied April 30, 1980.

Defendant was convicted in the 27th Judicial District Court, Bell County, Wil-

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App. B

liam C. Black, Special Judge, for capital murder, and sentenced to death, and he appealed. The Court of Criminal Appeals, Dally, J., held that: (1) trial court did not err in refusing to charge on law of circumstantial evidence; (2) trial court did not abuse its discretion in overruling motion for change of venue; (3) trial court did not err by overruling challenges for cause to three venire members; (4) trial court did not abuse its discretion in denying defendant's request for three additional peremptory challenges; (5) trial court did not err in admitting evidence of extraneous offenses for limited purpose of showing motive; (6) trial court was not required to define "probability" in its charge to jury at punishment stage; (7) trial court did not err by permitting psychiatrists to testify, on basis of hypothetical question, as to probability defendant would commit acts of violence in the future; (8) statute governing procedure at punishment stage in capital cases is not unconstitutional; (9) evidence was more than adequate to support death sentence; (10) evidence was sufficient to support conviction; (11) trial court did not abuse its discretion in overruling defendant's motion to sequester jury during trial.

Affirmed

Roberts, J., concurred in result.

Clinton, J., dissented in part and filed statement in which Phillips, J., joined.

1. Criminal Law ⇐814(17)

If accused admits or confesses killing of deceased, proof of admission or confession is direct evidence of main inculpatory fact and charge on circumstantial evidence is not required.

2. Criminal Law ⇐814(17)

If admission or confession is equivocal as to killing of deceased, or if it is not clear that killing admitted or confessed is killing with which defendant is accused, proof of admission or confession alone will not relieve trial court of necessity of giving circumstantial evidence charge.

3. Criminal Law ⇐814(17)

Even if admission or confession is equivocal, circumstantial evidence charge is not necessary if other evidence, together with confession, conclusively establishes that killing confessed is killing for which defendant is on trial.

4. Criminal Law ⇐814(17)

In prosecution for capital murder, trial court did not err in refusing to charge on law of circumstantial evidence where defendant admitted to killing a police officer, victim was only peace officer killed that day, defendant described shooting in manner consistent with murder and other evidence conclusively established that killing confessed was killing for which defendant was on trial.

5. Criminal Law ⇐121

In prosecution for capital murder of police officer, even though evidence raised fact issues of whether defendant could obtain fair and impartial trial in county, there was no evidence that defendant did not receive fair trial by impartial jury free from outside influence and trial court did not abuse its discretion in overruling motion for change of venue.

6. Criminal Law ⇐1035(5)

Defendant properly preserved alleged errors in overruling challenges for cause to three venire members and in failing to grant his request for additional peremptory challenges by his being forced to accept objectionable juror after his challenge for cause to venire member and his request for additional peremptory challenges were overruled.

7. Jury ⇐105(2)

Trial court did not err in overruling defendant's challenge for cause against venire member who was initially confused as to relationship between defendant's right to

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remain silent and his right to effective assistance of counsel, where subsequent questioning by prosecuting attorney and defense counsel made it clear that venire member did not expect defendant to testify or present other evidence but only that his attorneys would do their best on his behalf.

8. Jury ⇐108

Trial court did not err by overruling challenge for cause against venire member who initially believed that death was only proper punishment for capital murder where, after punishment alternatives and procedures were better explained, venire member clearly stated he would affirmatively answer punishment issues only if State met its burden of proof and that he believed death to be proper punishment only if answers to issues were yes.

9. Jury ⇐103(1)

In prosecution for capital murder, trial court did not err by overruling challenge for cause based on venire member's alleged opinion as to defendant's guilt, where voir dire failed to show that venire member would be influenced as juror by any opinion or prejudice or by anything he may have heard or read about case.

10. Jury ⇐108

In prosecution for capital murder, trial court did not err in overruling defendant's challenge for cause based on venire member's alleged bias against minimum punishment for murder where venire member stated that he could consider minimum punishment in a proper case. Vernon's Ann.C.C.P. art. 35.16(c), par. 2.

11. Jury ⇐136(1)

In prosecution for capital murder, trial court did not abuse its discretion in denying defendant's request for three additional peremptory challenges where each of those three venire members whom defendant proposed to challenge were not excludable for cause.

12. Criminal Law ⇐339.1

Generally, accused is entitled to be tried on accusation made in state's pleading and not for some collateral crime or for being criminal generally.

13. Criminal Law ⇐371(12)

Evidence showing motive is admissible even though it shows commission of extraneous offense.

14. Criminal Law ⇐371(12)

In prosecution for capital murder of police officer who stopped defendant for questioning in arson investigation, trial court did not err in admitting evidence of extraneous offense involving criminal sexual penetration of a minor for limited purpose of showing murder was motivated by desire to avoid facing those charges.

15. Criminal Law ⇐800(2)

At punishment stage of prosecution for capital murder, trial court is not required to define "probability" in its charge to jury concerning probability that defendant would commit acts of violence in future. Vernon's Ann.C.C.P. art. 37.071.

16. Homicide ⇐354

Trial court may admit for whatever value it may have to jury psychiatric testimony concerning defendant's future behavior at punishment stage of capital murder trial. Vernon's Ann.C.C.P. art. 37.071.

17. Homicide ⇐354

At punishment stage of prosecution for capital murder, trial court did not err by permitting two psychiatrists to testify, on basis of hypothetical question, as to probability that defendant would commit acts of violence in future. Vernon's Ann.C.C.P. art. 37.071.

18. Criminal Law ⇐353(1)

Although hypothetical question to expert must be based on facts of case, counsel may assume facts in accordance with his theory of case; if opponent desires to secure expert's opinion upon different set of facts he may do so on cross-examination. Vernon's Ann.C.C.P. art. 37.071.

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19. Criminal Law ⇐469

Expert witnesses may be permitted to express opinion as to probability of future violent behavior since terms "probability," "criminal acts of violence," and "continuing threats to society" are not terms defined by statute or case law but are words of ordinary meaning. Vernon's Ann.C.C.P. art. 37.071.

20. Criminal Law ⇐1206(1)

Statute governing procedure during punishment stage in capital case is not unconstitutional, despite claim that its use of term "probability" is vague. Vernon's Ann. C.C.P. art. 37.071.

21. Homicide ⇐354

In prosecution for capital murder, evidence adduced at punishment stage of trial, as to defendant's bad reputation for being peaceful and law-abiding citizen and his prior convictions, along with evidence adduced at guilt-innocence stage, was more than adequate to support death sentence. Vernon's Ann.C.C.P. art. 37.071.

22. Homicide ⇐250

Evidence was sufficient to support conviction for capital murder.

23. Criminal Law ⇐854(2)

Whether to grant motion to sequester jury during trial is within discretion of trial court.

24. Criminal Law ⇐854(2)

In prosecution for capital murder, trial judge did not abuse his discretion in overruling defendant's motion to sequester jury during trial.

Stephen E. Blythe, Gerald M. Brown, Temple, for appellant.

Arthur C. Eads, Dist. Atty., Ralph Petty, Jr., James T. Russell and Steven C. Copenhaver, Asst. Dist. Attys., Belton, Robert Huttash, State's Atty., Austin, for the State.

Before the court en banc.

OPINION

DALLY, Judge.

This is an appeal from a conviction capital murder. The punishment is dea

Appellant contends that the trial co erred by failing to instruct the jury at t guilt-innocence stage of the trial on the l of circumstantial evidence, denying his m tion for change of venue, overruling challenges for cause of three prospecti jurors, refusing his request for addition peremptory challenges, admitting eviden of extraneous offenses, failing to defi "probability" in the charge at the punis ment stage, and overruling his objections t the testimony of two witnesses as to th probability he would commit acts of vi lence in the future. Appellant also con tends that Art. 37.071, V.A.C.C.P., is uncon stitutionally vague.

Appellant was convicted for the murde of Harker Heights police officer Carl Levin The appellant fatally shot Levin after the officer stopped him for questioning in an arson investigation. Although appellant does not contest the sufficiency of the evidence, a detailed review of the testimony is required in order to discuss his contention that the circumstantial evidence charge should have been submitted to the jury.

Appellant and four other persons were living in a trailer in Killeen during the summer of 1978. One of the appellant's roommates, Donnie Ray Tiller, testified that appellant had asked him for a gun and stated that he intended to kill a Harker Heights policeman who had allegedly mistreated him during an arrest for public intoxication. Appellant also told Tiller of his plans to commit various robberies in Harker Heights.

On August 6, 1978, appellant told Tiller that he was going to commit a robbery the next morning at the Oasis Club in Harker Heights after creating a diversion by bomb-

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ing or setting fire to a building. Appellant stated to Tiller that he would kill anybody who recognized him as the robber. Appellant was wearing a white T-shirt and blue jeans at the time of this conversation.

Another roommate, Robert Roberson, testified that appellant awakened him at approximately 4:30 a. m. on October 7 and asked him for a ride to Harker Heights. Appellant was wearing a white T-shirt and blue jeans, and was armed with a .25 caliber automatic pistol and a home-made bomb. On the way to Harker Heights, appellant told Roberson he was going to blow up the Silver Spur, a night club. After first stopping at a convenience store where appellant filled an empty plastic milk jug with gasoline, Roberson dropped appellant off near the Silver Spur at about 5:00 a. m. and returned to the trailer.

John Edwards, a soldier at Fort Hood, drove past the Silver Spur at 5:15 a. m. He saw flames coming from the roof and a man he identified as appellant standing in the parking lot. As Edwards watched, appellant began to run along Highway 190. Edwards drove to the police station, which was nearby, to report the fire and then returned to the Silver Spur. On his way back to the fire, Edwards saw appellant near the intersection of Highway 190 and Amy Lane.

Back at the fire, Edwards saw a fireman remove a melted plastic jug from the roof of the building. He then told Officer Levin what he had seen. Levin, who was in uniform and driving a marked patrol car, left the scene of the fire and drove toward Amy Lane.

Michael Thrash, another Fort Hood soldier, lived on Amy Lane. He was walking to work at 5:35 a. m. when he saw a patrol car parked at the intersection of Amy Lane and Valley Road with its emergency lights on and its spotlight trained on some bushes. Officer Levin was standing beside the patrol car. A man wearing a white T-shirt and blue jeans stepped out of the bushes and walked toward the officer. The man then shot Levin in the head at point-blank range and fled down Valley Road.

Mary Richards, who lived on Valley Road, heard the shot and looking through a window, she saw a man wearing a white T-shirt running down Valley Road from Amy Lane. Richards could not positively identify appellant, but testified he resembled the man she saw.

Appellant called Tiller at approximately 10:30 a. m. on the morning of the shooting. Tiller described the conversation as follows:

> "I answered the phone. He said, Donnie, I said, yes. He said this is Darren. He says have you been listening to the news? And I said, yes, Darren, did you do that? He said, Yeah, I shot him. I killed the mother fucker. I shot him in the head."

Tiller testified that this conversation was in reference to the August 7 shooting of the Harker Heights policeman. After appellant hung up, Tiller contacted the police.

Appellant returned to the trailer after the shooting and spoke to Roberson. Roberson testified that appellant was still dressed in a white T-shirt and blue jeans, had red blotches which appeared to be blood on his face and shirt, and appeared to be in a state of panic. After Roberson told him that the police had been to the trailer looking for him, appellant said that "he had to get out of town because he wasted a cop, that he killed a cop." Asked by Roberson how he had done it, appellant reached for his back pocket and then pointed his finger at Roberson's head at the place corresponding to the bullet wound to the head of the deceased. After washing up and changing clothes, appellant left the trailer.

Francisco Hernandez testified that he met appellant in downtown Killeen on the morning of August 7. He invited appellant to his home for lunch and subsequently offered to let him spend the night. The next morning, after hearing a radio news report describing the suspect in the Levin murder, appellant told Hernandez that "I

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am the one that they're looking for but I didn't kill no policeman."

Appellant subsequently made his way to Belton, where he boarded a bus for Houston. Police acting on information from Hernandez arrested appellant at the bus station in Houston at approximately 11:30 p. m. August 8. A .25 caliber automatic pistol that ballistics tests proved fired the bullet that killed Levin was in appellant's pocket at the time of his arrest.

David Kingsley was acting Chief of Police for Harker Heights at the time of the charged offense. He testified that Officer Levin was the only peace officer killed in Bell County on August 7, 1978.

[1-3] If the accused admits or confesses killing the deceased, proof of the admission or confession is direct evidence of the main inculpatory fact and a charge on circumstantial evidence is not required. *Sloan v. State*, 515 S.W.2d 913 (Tex.Cr.App.1974); *Hurd v. State*, 513 S.W.2d 936 (Tex.Cr.App. 1974); *Swift v. State*, 509 S.W.2d 586 (Tex. Cr.App.1974). However, if the admission or confession is equivocal as to the killing of the deceased, or if it is not clear that the killing admitted or confessed is the killing with which the defendant is accused, proof of the admission or confession alone will not relieve the trial court of the necessity of giving a circumstantial evidence charge. *Ridyolph v. State*, 545 S.W.2d 784 (Tex.Cr. App.1977); *Hielscher v. State*, 511 S.W.2d 305 (Tex.Cr.App.1974); *Martinez v. State*, 151 Tex.Cr.R. 316, 207 S.W.2d 387 (1948). Even if the confession is equivocal, a circumstantial evidence charge is not necessary if the other evidence, together with the confession, conclusively establishes that the killing confessed is the killing for which the defendant is on trial. *Ridyolph v. State*, supra; *Hogan v. State*, 496 S.W.2d 594 (Tex.Cr.App.1973); *Steel v. State*, 459 S.W.2d 649 (Tex.Cr.App.1970); *Patterson v. State*, 416 S.W.2d 816 (Tex.Cr.App.1967).

[4] Tiller testified that appellant's admission to him that he "shot him in the head" was in reference to the shooting of the Harker Heights policeman on August 7. Officer Levin, who was shot in the head, was the only peace officer in Bell County killed that day. Appellant told Roberson that he "killed a cop" and described the shooting in a manner consistent with the murder of Levin. Appellant was seen in the area a few minutes prior to the shooting wearing a white T-shirt and blue jeans, the witness to the shooting testified that the assailant was dressed in that fashion, and Roberson testified that appellant was so dressed when he returned to the trailer splattered with blood. These facts, together with the other evidence discussed above, leave no reasonable doubt that the killing admitted by appellant was that of Officer Levin. Therefore, the admissions are direct evidence of the main inculpatory fact and the trial court did not err in refusing to charge on the law of circumstantial evidence. See and compare *Ridyolph v. State*, supra; *Casey v. State*, 523 S.W.2d 658 (Tex. Cr.App.1975); *Hielscher v. State*, supra; *Hogan v. State*, supra; *Steel v. State*, supra; *Patterson v. State*, supra.

Appellant contends that the trial court erred by refusing his motion for a change of venue. Appellant argues that news accounts of the shooting had created such a prejudice against him that he could not obtain a fair and impartial trial in Bell County.

The trial of appellant commenced eighty-three days after the commission of the offense. The hearing on the change of venue motion was held September 20, 1978, forty-four days after the shooting. Six residents of Bell County testified that in their opinion appellant could not receive a fair trial in the county at the time of the hearing of the motion. However, four of these witnesses stated during cross-examination that they could be fair and impartial if selected as jurors. Appellant's other witnesses were employees of local newspapers and radio and television stations. Each described the coverage appellant's case had received and

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identified copies of newspaper stories and transcripts of broadcasts that were admitted in evidence. On cross-examination, these witnesses stated that the purpose of their news coverage had been to inform, not to inflame, the public, that they believed appellant could receive a fair trial, and that they could be impartial jurors.

The State called eleven witnesses to testify that there was not such a prejudice against appellant in Bell County that he could not receive a fair trial. The State also introduced evidence showing that the county's population was between 125,000 and 158,000; that there were 45,000 registered voters in the county; and that the four largest cities in the county were Killeen, population 52,000, Temple, population 48,000, Harker Heights, population 10,500, and Belton, population 10,000.

[5] The evidence raised fact issues whether appellant could obtain a fair and impartial trial in Bell County. These issues were decided adversely to appellant when the trial judge, as the trier of fact, overruled the motion for change of venue. *Von Byrd v. State*, 569 S.W.2d 883 (Tex.Cr.App. 1978); *Freeman v. State*, 556 S.W.2d 287 (Tex.Cr.App.1977).

Although appellant did not renew his motion for change of venue, it is instructive to consider the voir dire examination of prospective jurors which began October 31, 1978. Both appellant and the State agree that of the 132 prospective jurors examined, 63 had heard something about the case through news reports and 21 had formed an opinion that appellant was guilty. They also agree that 11 of the jurors selected had heard about the case, but all testified that they could be fair and impartial and would base their verdict on the evidence presented in court.

Finally, we have examined the newspaper stories and broadcast transcripts in the record and find that they are factual and not inflammatory. They do not in themselves establish prejudice or require a change of venue. *Freeman v. State*, supra; *Knight v. State*, 538 S.W.2d 101 (Tex.Cr.App.1975).

We find no evidence that appellant did not receive a fair trial by an impartial jury free from outside influence. The trial court did not abuse its discretion in overruling the motion for change of venue.

[6] Appellant contends that the trial court erred in overruling his challenges for cause to three venire members and in failing to grant his request for additional peremptory challenges. Two of these venire members, Johnnie Kopriva and Robert Latsha, were peremptorily challenged by appellant after his challenges for cause were overruled. Appellant subsequently exhausted his peremptory challenges and, after his challenge for cause to venire member James Smith and his request for additional peremptory challenges were overruled, was forced to accept Smith as a juror despite his declaration that Smith was an objectionable juror. Thus, appellant properly preserved the alleged errors. *Hernandez v. State*, 563 S.W.2d 947 (Tex.Cr.App. 1978); *Wolfe v. State*, 147 Tex.Cr.R. 62, 178 S.W.2d 274 (1944).

Appellant contends that venire member Kopriva was biased against a portion of the law on which appellant was entitled to rely. Specifically, he argues that Kopriva was unable to accept appellant's right to remain silent and present no evidence in his defense. This contention is based on the following voir dire examination by defense counsel:

"Q. Do you feel—and many people do, so you would not necessarily be in the minority—do you feel that a person accused of a criminal offense should be required to come in the courthouse and defend himself, stand up and defend himself?

"A. No, sir.

"Q. Do you feel that he should be required to put on any evidence of any type in the defense of his case?

"A. Yes, sir.

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"Q. You feel that he should, sir?

"A. Yes, sir he should. His lawyer should put a defense on if that's what you mean.

"Q. Yes, sir. That's what I'm asking.

"A. Yes, sir.

"Q. You feel that way, even though the law allows for the defendant to sit silently and not put on any evidence?

"A. I don't think that I understand that question, sir.

* * * * * *

"Q. A moment ago you kind of indicated that you felt he should put on some evidence.

"A. I didn't understand the question, though.

"Q. All right. To make sure we understand then, you're saying that he does not have to put on any evidence to satisfy you?

"MR. EADS: Objection, Your Honor.

"THE COURT: Overruled.

"Q. If you will answer my question, please sir. You are saying again that a defendant, does not have to put on any evidence to satisfy you that he's not guilty?

"A. No, sir. I think the lawyers should present their evidence of the case because—

"Q. You can explain that answer if you would like to, sir.

"A. Well, even though the State proves its case and—well, I would still like to hear the other side of the story."

After this exchange with defense counsel, the prosecutor explained to the venireman the State's burden of proof and the defendant's Fifth Amendment privilege. Kopriva indicated that he understood and that he would not hold appellant's silence against him. Defense counsel then reexamined Kopriva as follows:

"Q. Mr. Kopriva, Mr. Eads has done an excellent job of outlining for you what the law says and what the constitution says.

"A. Yes, sir.

"Q. You are certainly a mature adult, and you certainly have the option at this point of stating to us that you disagree with that law. All right, sir?

"A. (Headnod.)

"Q. So, that's really what I'm asking you. Do you, even though the law may say that the defendant has a right to remain silent, the law may say that the defendant can sit here and not open his mouth, the law may say that the defense counsel can sit here and not open their mouths. Do you yourself still feel that the lawyers should at least put on some evidence or that the defendant should at least take the stand?

"A. No, sir. I understand the question now. If he proves his case beyond a reasonable doubt that the defendant is guilty, well then, I'm sure that y'all are not going to sit there and just let—without saying a word—I mean, that's what the trial is about.

"Q. I'll admit we are kind of stretching it a little bit.

"A. Yes, sir.

"Q. And certainly we will be talking just as we are talking here today.

"A. Yes, sir.

"Q. But let's say we do all of our talking out here at the counsel table and no evidence of any kind is put forth in behalf of the defendant.

"A. Yes, sir.

"Q. Do you feel that a defendant should put on some evidence of some kind in order to refute or to contest his guilt?

"A. No, sir. I leave that up to the defendant."

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[7] It is obvious that Kopriva was initially confused as to the relationship between appellant's right to remain silent and his right to effective assistance of counsel. Subsequent questioning by both the prosecuting attorney and defense counsel makes it clear that Kopriva did not expect appellant to testify or present other evidence but only that his attorneys would do their best on his behalf. The trial court did not err by overruling the challenge for cause. *Scott v. State*, 490 S.W.2d 578 (Tex.Cr.App.1973).

Appellant contends that his challenge for cause to venire member Robert Latsha should have been granted because he believed that death is the only proper punishment for capital murder. This contention is based on the following exchange with defense counsel:

"Q. Okay, let's assume that the State puts on—here again, a hypothetical case, the State puts on—that you were sitting in a capital murder case and the State proved beyond a reasonable doubt, satisfied you that the individual, that the defendant in that particular case caused the death of a police officer by shooting him with a gun and that the defendant knew he was a police officer and knew he was acting in the lawful discharge of his duties.

"Now, do you have an opinion, having found that man guilty, as to what proper punishment would be in that case?

"A. Do I have an opinion as to what the proper punishment would be?

"Q. Yes, sir.

"A. I thought the way it was stated, there is only one punishment for capital murder.

"Q. All right. What do you believe the one punishment is for capital murder?

"A. The death penalty.

"Q. All right. And do you believe that should be the proper punishment for capital murder?

"A. Yes, sir.

"Q. And that's an affirmative opinion of yours?

"A. Yes, sir.

"Q. And is that an opinion that you have arrived at as a result of your past experience and your upbringing and your thinking that you have indicated that you have made about the death penalty?

"A. Yes, sir.

"Q. And it would be your position that if a capital murder case, involving the shooting of a police officer, that if that—if the individual was proven guilty beyond a reasonable doubt that he shot a police officer who was in the lawful exercise of his duties and knew that man was a police officer when he shot him, that in your mind the only proper punishment that could be given would be the death penalty?

"A. Yes, sir."

[8] Prior to this exchange, the prosecutor, during his voir dire, had stated to the venireman that the law provides that the punishment for capital murder "shall be death." That this misled Latsha is indicated by his statement to defense counsel that, "I thought the way it was stated, there is only one punishment for capital murder." After the punishment alternatives and procedure were better explained, Latsha clearly stated that he would affirmatively answer the punishment issues only if the State met its burden of proof and that he believed death to be the proper punishment only if the answers to the issues were yes. No error is shown.

Appellant contends juror James Smith expressed an opinion as to his guilt and a bias against the minimum punishment for murder during his voir dire examination. The first contention is based on the following exchange with defense counsel:

"So since we have publicity in this case I have to ask you, sir, whether

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or not, based on what you've read and maybe something you've heard from discussions at Fort Hood with people that you work with, whether you've formed an opinion as to the guilt or the innocence of this man?

"A. An opinion. I don't know whether it would be an opinion—an assumption I would say—assuming—I don't know.

"Q. Well, now, I don't know that it really requires, I think, whether you call it an opinion or assumption. Let me ask you this. Would it require some evidence for you to set aside that assumption or feeling that you have?

"A. I'm not a lawyer but it seems to me like if he was found with a weapon that would be pretty conclusive in my way of thinking. If it was proved to be the weapon that shot the policeman.

"Q. I understand what you're saying.

"A. I don't know.

"Q. And the point I'm trying to make, of course, is the State has gone over when we say the State has the burden of proof, what does that mean to you?

"A. It means they have to prove it beyond a doubt.

"Q. Alright, now, sometimes we have individuals and everyone's opinion, of course, they're entitled to their opinion and sometimes a person's opinion agrees with the law and sometimes it doesn't. Sometimes their feelings agree. We can't help but have feelings established about something and the only thing that I'm trying to get at is because of what you read and because of this feeling that you have, for example about the gun, would you require the defendant to produce evidence of his innocence to you before you could set aside these feelings?

"MR. EADS: I'll object to the question, Your Honor. He's said that he would make the State prove the burden of proof, your Honor.

"THE COURT: Overruled. Answer the question.

"A. I think the State would have to prove it.

"Q. . . . . You still would agree that you have formed some sort of feelings about this case?

"A. As to the guilt or innocence?

"Q. Yes, sir.

"A. An opinion, yes. I have formed an opinion but now whether it's been proven I don't know whether I'm correct or not.

* * * * * *

"Q. Let me ask you this, sir. If you were serving as a juror on a criminal case, not necessarily this case and at the close of evidence you felt like the defendant was probably guilty but you weren't sure beyond a reasonable doubt, how would you feel compelled to vote in the jury-room?

"A. You would have to prove to me that he was guilty as a juror before I would say guilty."

In *Murphy v. Florida*, 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975), the Supreme Court said:

"The constitutional standard of fairness requires that a defendant have 'a panel of impartial, "indifferent" jurors.' *Irvin v. Dowd*, 366 U.S. [717] at 722, 81 S.Ct. [1639] at 1642, 6 L.Ed.2d 751. Qualified jurors need not, however, be totally ignorant of the facts and issues involved.

" 'To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if

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the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.' Id., at 723, 81 S.Ct. [1639] at 1642.

"At the same time, the juror's assurance that he is equal to this task cannot be dispositive of the accused's rights, and it remains open to the defendant to demonstrate 'the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality.' Ibid."

421 U.S. at 799, 800, 95 S.Ct. at 2036.

[9] The voir dire of Smith fails to show that he would be influenced as a juror by any opinion or prejudice or by anything he may have heard or read about the case. The trial court did not err in overruling appellant's challenge for cause based on Smith's alleged opinion as to appellant's guilt. *Freeman v. State*, supra.

Appellant's contention that Smith was biased against the minimum punishment for murder is based on the following voir dire examination by defense counsel:

"Q. And murder being defined the same way, the knowing and intentional killing of another human being. Do you feel like that in a murder case that you could consider as little as five years as a punishment?

"A. I don't think so, sir.

"THE COURT: Counsel, you need to explain to him that you're talking about not this case but a proper case.

"Q. Right. We're not talking about any particular murder case. The definition of murder never changes. Murder is always the intentional and knowing killing of another human being. But the facts change.

"A. Yes, sir.

"Q. And we have different facts and different cases so we have a range of punishment that varies. But even so some people themselves feel that since the definition never changes that they just could not go along with what the law says and give somebody as low as five years for the intentional and knowing killing of another human being.

"A. I think my answer would have to depend on the facts of the case involved, would it not? That's a hard question for me to answer.

"Q. I understand, sir. I'm just—

"A. I'm not trying to hedge, I just don't know the answer.

"Q. I understand what you're saying. And as the judge said we're not talking about a particular case, but we do have the same definition regardless of what the facts are and so I'm just talking about where you have the knowing and intentional killing of another human being.

"A. If it's obvious murder I don't think five years is—I don't see the five years.

"Q. Where do you get this opinion from?

"A. I just don't believe in murder.

"Q. Alright. You understand, of course, that as the judge has said, we don't know what the facts would be and I would submit to you that there are all kinds of facts—

"A. Yes, sir.

"Q. And that some facts there may be some sort of mitigating circumstances and I don't know what those mitigating circumstances would be but still you would think that regardless of what was shown to you that you would still be unable to give five years in a case for the knowing and intentional killing of another human being?

"A. Yes, sir, I don't think I could."

Thereafter, the prosecutor sought to rehabilitate the juror by demonstrating the wide range of fact situations that may fall within the murder statute. The prosecutor then questioned Smith as follows:

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"The point I'm trying to make, Mr. Smith, is this. You can see why we have a range of punishment for murder.

"A. Yes, sir, I see.

"Q. And all I'm saying is, do you feel like that as a juror in the State of Texas, that you could sit and listen to the evidence and consider the full range of punishment in a criminal case. If it's a murder case you could consider not less than five years or life in the Texas Department of Corrections in that proper case where the facts justified it. Where the law allowed it and the circumstances warranted that particular punishment? That's the point I'm trying to make."

[10] Smith stated that he could consider the minimum punishment in a proper case. The record does not support appellant's contention that Smith could not give the minimum punishment of five years and that the juror was subject to challenge for cause pursuant to Art. 35.16(c)(2), V.A.C.C.P. *Von Byrd v. State*, supra.

[11] Since we have concluded that Kopriva, Latsha, and Smith were not excludable for cause, it follows that appellant was not wrongfully deprived of a peremptory challenge upon a venire member who was subject to challenge for cause or forced to accept such a venire member as a juror. Thus, the trial court did not abuse its discretion in denying appellant's request for three additional peremptory challenges. *Von Byrd v. State*, supra; *Burns v. State*, 556 S.W.2d 270 (Tex.Cr.App.1977).

In twelve grounds of error, appellant complains of the admission of evidence offered to show a motive for the commission of the instant offense that also shows he committed extraneous offenses in New Mexico. Michael Roach, a deputy sheriff in Valencia County, New Mexico, testified that he arrested appellant on October 29, 1977, for criminal sexual penetration of a minor and later took him before a magistrate for arraignment. John Horecek, a magistrate in Valencia County, testified that he arraigned appellant on November 1, 1977. At this time, Horecek informed appellant that he was charged with two counts of sexual penetration of a minor carrying a maximum punishment of imprisonment for life and one count of kidnapping carrying a maximum punishment of imprisonment for fifty years, and set bail at $100,000. Ronald Childress, a New Mexico attorney, testified that he represented appellant in regard to these charges and that a trial was set for January 30, 1978. Lawrence Romero, sheriff of Valencia County, Daniel Hawkes, a deputy sheriff, and Velma Hardesty, the jailer, testified that appellant escaped from the Valencia County jail on January 9, 1978. These witnesses identified and the trial court admitted in evidence certified copies of the complaint, indictment, and arraignment in the sexual penetration and kidnapping case, and an indictment and arrest warrant charging appellant with escape.

[12, 13] In its charge to the jury, the trial court limited the jurors' consideration of these extraneous offenses to the question of appellant's motive for killing the deceased. One of the exceptions to the general rule that an accused is entitled to be tried on the accusation made in the State's pleading and not for some collateral crime or for being a criminal generally is that evidence showing a motive is admissible even though it also shows the commission of an extraneous offense. *Hughes v. State*, 563 S.W.2d 581 (Tex.Cr.App.1978); *Cherry v. State*, 488 S.W.2d 744 (Tex.Cr.App.1972); *Rodriguez v. State*, 486 S.W.2d 355 (Tex.Cr.App.1972); *Stephens v. State*, 147 Tex.Cr.R. 510, 182 S.W.2d 707 (Tex.Cr.App.1944).

Although several cases in which extraneous offenses were held admissible to show motive were prosecutions for escape or for offenses growing out of an escape, appellant is mistaken when he argues that the rule of admissibility is limited to this nar-

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row fact situation. In *Hughes v. State*, supra, the defendant shot a police officer who had stopped him for investigation of a reported case of credit card abuse. This Court held that the defendant's extortion conviction in an Alabama federal court seven months prior to the shooting, which resulted in a three-year probated sentence, was admissible to show motive. In *Cherry v. State*, supra, the defendant's escape from a Georgia penitentiary, where he was serving a life sentence, was held to be admissible to show his motive for shooting a police officer eight months later. To the same effect are *Washburn v. State*, 167 Tex.Cr.R. 125, 318 S.W.2d 627 (1958) (evidence that the defendant attempted to extort money from his victim four years prior to the murder) and *Ellisor v. State*, 162 Tex.Cr.R. 117, 282 S.W.2d 393 (1955) (evidence that the defendant committed a burglary two days prior to shooting a police officer who stopped him for speeding.)

[14] Appellant argues that it was unnecessary to admit the New Mexico offenses because there was other evidence of motive, including the apparent arson at the Silver Spur and statements appellant had made to friends threatening to kill a Harker Heights policeman. That appellant may have had other motives for killing Levin, however, does not mean that he was not motivated by a desire to avoid his return to New Mexico. See *Hughes v. State*, supra; *Ellisor v. State*, supra. The trial court did not err in admitting the evidence of extraneous offenses for the limited purpose of showing motive.

[15] Appellant contends that the trial court erred by refusing to define "probability" in its charge to the jury at the punishment stage of the trial. This Court has previously held that such a definition is not required. *King v. State*, 553 S.W.2d 105 (Tex.Cr.App. 1977). No error is presented.

Two psychiatrists, Drs. John Holbrook and James Grigson, were called by the State to testify at the punishment stage of the trial. Both doctors were given a hypothetical fact situation based on the evidence in this case and asked if the individual described in that question would probably commit future acts of violence that would constitute a continuing threat to society. Both doctors testified that in their opinion he would do so.

Appellant argued at the trial, as he does now on appeal, that Holbrook and Grigson were not qualified to give an opinion as to his future conduct because they had not personally examined him and based their opinions solely on the State's hypothetical question. Appellant also argues that psychiatrists, as a group, are not qualified by education or training to predict future behavior. Appellant does not contest the individual qualifications of either witness.

[16] This Court is well aware that the ability of psychiatrists to predict future behavior is the subject of widespread debate. However, we are not inclined to alter our previously stated view that a trial court may admit for whatever value it may have to a jury psychiatric testimony concerning the defendant's future behavior at the punishment stage of a capital murder trial. *Chambers v. State*, 568 S.W.2d 313 (Tex.Cr.App.1978); *Moore v. State*, 542 S.W.2d 664 (Tex.Cr.App.1976).

[17] The trial court did not err by permitting the doctors to testify on the basis of the hypothetical question. The use of hypothetical questions in the examination of expert witnesses is a well established practice. 2 C. McCormick and R. Ray, Texas Evidence, Sec. 1402 (2d ed. 1956). That the experts had not examined appellant went to the weight of their testimony, not to its admissibility.

[18] Appellant argues that the hypothetical question was improper because it was not based on all of the evidence in the case. Although a hypothetical question must be based on the facts of the case, counsel may assume the facts in accordance

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with his theory of the case. If the opponent desires to secure the expert's opinion upon a different set of facts he may do so on cross-examination. *Atkinson v. State*, 511 S.W.2d 293 (Tex.Cr.App.1974); *Knoeppel v. State*, 382 S.W.2d 493 (Tex.Cr.App. 1964); *McMurrey v. State*, 145 Tex.Cr.R. 439, 168 S.W.2d 858 (Tex.Cr.App.1943); *Davis v. State*, 54 Tex.Cr.R. 236, 114 S.W. 366 (1908). These grounds of error are overruled.

[19] Appellant also contends that Holbrook and Grigson should not have been permitted to express an opinion as to the probability of future violent behavior on his part because such testimony constitutes a legal conclusion. Appellant cites the case of *Carr v. Radkey*, 393 S.W.2d 806 (Tex.Sup. 1965). In that case, the Court held that

> "a witness may not be asked whether a testator had the mental capacity to make and publish a will because, under *Brown v. Mitchell* [88 Tex. 350, 31 S.W. 621 (1895)] whether a person has mental capacity to execute a will involves a legal definition and a legal test. A witness may be asked, assuming he knows or is a properly qualified expert, whether the testator knew or had the capacity to know the objects of his bounty, the nature of the transaction in which he was engaged, the nature and extent of his estate, and similar questions." 393 S.W.2d at 813.

Appellant argues that a witness should not be permitted to testify that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society because the question involves a legal definition and a legal test.

Appellant's contention is without merit for the simple reason that "probability," "criminal acts of violence," and "continuing threat to society" are not terms defined by statute or case law. On the contrary, they are words of ordinary meaning. *King v. State*, supra. Thus, the testimony in question did not involve the application of a legal definition or test. We also note that if appellant were correct in arguing that a witness may not express an opinion on a matter involving a legal definition or test, this would, among other things, prevent the routine practice of asking a psychiatrist whether, in his opinion, the defendant was legally insane at the time of the offense. V.T.C.A.Penal Code, Sec. 8.01.

[20] Finally, appellant contends that Art. 37.071, V.A.C.C.P., is unconstitutional because the term "probability" is so vague that men of common intelligence must guess as to its meaning and application. This contention has been repeatedly overruled by this Court. *Granviel v. State*, 552 S.W.2d 107 (Tex.Cr.App.1976); *Collins v. State*, 548 S.W.2d 368 (Tex.Cr.App.1976); *Jurek v. State*, 522 S.W.2d 934 (Tex.Cr.App. 1975), aff'd 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976).

[21] At the punishment stage of the trial, witnesses from various cities in New Mexico, Kansas, Oklahoma, Louisiana, and Texas testified that appellant's reputation in their communities for being a peaceful and law-abiding citizen was bad. Evidence was also admitted of appellant's prior conviction in Louisiana for possession and distribution of marihuana, possession of amphetamine, and carrying a concealed weapon, and in a federal district court in Oklahoma for unlawful possession of a sawed-off shotgun. This evidence, together with the evidence adduced at the guilt-innocence stage of the trial, is more than adequate to support the jury's affirmative answers to the punishment issues.

[22-24] Although appellant's counsel and the State have both filed briefs which are of excellent quality and which greatly aided the Court in its difficult decision, the appellant has filed a pro se brief in which he asserts additional grounds of error. In addition to the grounds of error urged by counsel appellant asserts that the trial court

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erred in refusing to grant his motion for an instructed verdict and in refusing to sequester the jury during the trial. The evidence that we have already summarized in this opinion is amply sufficient to support the jury's verdict and the court did not err in overruling appellant's motion for an instructed verdict. The careful trial judge considered the appellant's motion concerning the sequestering of the jury during the trial and overruled that motion. Whether to grant this motion is within the discretion of the trial court, and we find nothing to show an abuse of discretion by the trial judge in overruling that motion. The grounds of error presented by the pro se brief are overruled.

The judgment is affirmed.

ROBERTS, J., concurs in result.

CLINTON, Judge, dissenting in part.

To the overruling of the twelve grounds of error concerning admission of evidence showing commission of extraneous offenses in New Mexico, I respectfully dissent. The Court appears to recognize other proof made by the State and to acknowledge that it showed appellant killed Levin from a more immediate, localized motivation. Given the obvious prejudicial impact of the extraneous New Mexico offenses, I cannot agree that we may tolerate it on the double negative theory that existence of other motives for killing Levin "does not mean that he was not motivated by a desire to avoid his return to New Mexico." It seems clear to me that this is the classic case where slight probative value is far outweighed by heavy prejudice.

PHILLIPS, J., joins.

Robin CORDARY, Appellant,

v.

The STATE of Texas, Appellee.

No. 62376.

Court of Criminal Appeals of Texas,
Panel No. 3.

March 19, 1980.

Rehearing Denied April 30, 1980.

Defendant, who was convicted of selling LSD, appealed from an order of the 43rd Judicial District Court, Parker County, Harry W. Hopkins, J., which revoked her probation. The Court of Criminal Appeals, Phillips, J., held that under statute in effect at time of defendant's conviction at which time defendant was 16 years of age, district court did not have jurisdiction over the defendant, who was never made subject to juvenile court proceedings prior to being indicted and convicted as an adult, and therefore her conviction was void; furthermore, inasmuch as defendant was not given an examining trial prior to return of her indictment, indictment was void.

Judgment reversed; prosecution under indictment dismissed.

Dally, J., dissented.

Indictment and Information ⇐9
Infants ⇐68.5

Under statute in effect at time of defendant's conviction at which time defendant was 16 years of age district court did not have jurisdiction over the defendant, who was never made subject to juvenile court proceedings prior to being indicted and convicted as an adult, and therefore her conviction for sale of LSD was void; furthermore, inasmuch as defendant was not given an examining trial prior to return of indictment, indictment was void. V.T.C.A., Digest

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NO. 26,812-A

EX PARTE		IN THE 27TH DISTRICT COURT
		OF
THOMAS A. BAREFOOT		BELL COUNTY, TEXAS

ORDER

On this day came on for consideration the Applicant's Petition for Writ of Habeas Corpus and the State's Answer thereto and having considered the same, the Court enters the following finding of fact, conclusions of law and recommendations.

a.m. 4:45 p.m. o'clock

OCT 6 1981

D. CARPENTER
District Court, Bell County, Texas
By [illegible] Deputy

I

HISTORY OF THE CASE

The Applicant is presently in the Texas Department of Corrections by virtue of a judgment and sentence issued from the 27th District Court of Bell County, Texas in Cause No. 26,812 wherein the Applicant was charged with capital murder. On November 14, 1978, the Applicant was tried before a jury which found him guilty of capital murder and answered the two special issue questions on punishment in the affirmative. Upon automatic appeal to the Court of Criminal Appeals, the conviction was affirmed on June 2, 1980 in Cause No. 63,713 and the opinion is reported in State vs. Barefoot, 596 S.W.2d 875 (Tex. Cr. App. 1980). Thereafter the Applicant was sentenced to die by injection before sunrise on September 17, 1980.

On July 29, 1980, a stay of execution was granted by the Supreme Court of the United States pending the filing of a Petition for Writ of Certiorari. The Petition was filed in Cause No. 805,320 on August 27, 1980 and on June 29, 1981 the Petition was denied and the stay of execution was dissolved. On August 14, 1981 the Applicant was again sentenced to death by the trial court which set his execution sometime before sunrise on October 13, 1981.

II

ALLEGATIONS OF THE PETITIONER

The Petitioner's allegations will be stated as they are considered.

App. C

III

NECESSITY FOR AN EVIDENTIARY HEARING

There is no necessity for an evidentiary hearing for the reason that there is no fact in issue that cannot be found from the record.

IV

FINDING OF FACT AND CONCLUSIONS OF LAW

A

The Applicant first alleges in points of error one and three that prospective juror Ruby Sanders was excluded in violation of Witherspoon vs. Illinois, 391 U.S. 510 (1968) and Adams vs. Texas _____U.S. _____, 100 S. Ct. 2521 (1980). The State alleges first that Applicant waived any error by failing to object and secondly that the prospective juror was not excluded in violation of Witherspoon or Adams.

The Court finds that the Petitioner failed to object to the exclusion of the prospective Juror and that any Witherspoon error was waived. White vs. State, 610 S.W.2d 504 (Tex. Cr. App. 1981). The Court is further of the opinion that the prospective juror was not challenged on or excluded under the 12.31 (b) issue considered in Adams vs. Texas. The Court finds that prospective juror was challenged for the reason that she was disqualified under Witherspoon and that she was properly excluded on that basis.

B

The Applicant alleges in point two that the Applicant failed to receive effective assistance of counsel because counsel failed to object to the Court's exclusion of prospective juror Ruby Sanders for cause.

The Court is of the opinion that this failure does not demonstrate incompetency of counsel or amount to ineffective assistance of counsel.

C

The Applicant next alleges in points four and five that he was denied effective assistance of counsel and due process of law because counsel for the defense failed to render effective assistance of counsel during the voir dire.

One of the Applicant's chief complaints in this regard is that counsel for defense did not understand the principles of Witherspoon. This Court is of the opinion that the record reflects otherwise. The Applicant also complains that counsel for the defense agreed to excuse several prospective jurors, failed to object to the exclusion of others and failed to attempt to rehabilitate several jurors who were challenged for cause under Witherspoon. The fact that these events occurred does not demonstrate incompetency of counsel. Trial counsel is not to be judged by hindsight or by the fact other counsel would have done differently. The test of effective assistance of counsel is not errorless counsel "but counsel reasonably likely to render and rendering reasonably effective assistance". Mac Kenna vs. Ellis, 280 F.2d 592, 599 (5th Cir. 1960). In applying this test, moreover, the entire representation must be considered and not just the voir dire as suggested by Applicant's present counsel.

When this Court appointed Gerald Brown and Steve Blythe to represent the Applicant at trial, the Court considered the qualifications of Mr. Brown and Mr. Blythe in criminal matters to represent the Petitioner against the serious offense charged. Mr. Brown is certified by the Board of Legal Specialization as a Specialist in Criminal Law. Both Mr. Brown and Mr. Blythe regularly handle serious criminal cases and have done so for at least the past seven years and both enjoy an excellent reputation among criminal law practitioners of this county and others as competent in criminal law matters. This Court, moreover, has had many occasions during the past seven years to observe the quality of their representation in serious criminal cases and have never found it wanting.

Having considered the totality of the representation rendered by trial counsel, this Court finds that the Petitioner enjoyed the effective assistance of counsel.

D

The Petitioner next alleges in point six that he was denied his rights under the Sixth and Fourteenth Amendments because the Court failed to sustain

his challenge for cause to several prospective jurors who could not consider the minimum punishment of five years for the lesser included offense of murder and for the further reason that the Court erroneously granted a similar challenge to a prospective juror made by the State.

The Court presumes that the Petitioner is complaining about prospective jurors Johnnie Kopriva, James Smith and Wilbert Baca. The Court finds that prospective jurors Kopriva and Smith could consider the minimum punishment of five years for the offense of murder and that the Court did not err in overruling the Applicant's challenges for cause. The Court further finds that prospective juror Wilbert Baca could not consider the minimum punishment of five years for the offense of murder and that the Court did not err in sustaining the State's challenge to the said prospective juror. The Court further finds that the Petitioner did not object to the exclusion of prospective juror Baca and that any error was thus waived.

The Petitioner further alleges that the State's challenges were considered under a more liberal standard than Petitioners. The Court finds that this allegation is not true.

E

The Petitioner next alleges in point seven that "the entire voir dire examination, under the totality of the circumstances, was designed to and did produce a jury organized to return a punishment of death, contrary to the mandate of Witherspoon vs. Illinois, 391 U.S. 510 (1968) and in violation of the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States".

The Court finds that no prospective juror was wrongfully excluded from jury service in violation of Witherspoon over objection.

F

The Petitioner next alleges in points of error eight, nine, and ten that the use of psychiatric testimony that the petition would be a continuing danger to society which was based solely upon hypothetical

question that contained a detailed summary of the facts but included no medical, psychiatric or psychological facts or history and none of the mitigating evidence violated his rights under the Eighth and Fourteenth for the reason that such testimony was unreliable, bolstered the State's punishment evidence with the gloss of medical expertise and created a significant risk that the jury would inaccurately assess the credibility of such testimony and made an inaccurate decision to impose death.

The heart of Petitioner's complaint is that the use of psychiatric testimony by hypothetical question is so inherently unreliable that it offends due process of law and corrupts the accuracy of the sentence determination procedure. The use of psychiatric testimony on the issue of dangerousness has been approved by the Supremem Court in Jurek vs. Texas, 428 U.S. 262 (1976) and Estelle vs. Smith, _____ U.S. _____ (1981) by necessary implication. The fact that the psychiatrists did not personally examine the Petitioner but rather testified on the basis of hypothetical questions goes to the weight and not the admissibility of the expert opinion. Barefoot vs. State, 596 S.W.2nd 875 (Tex. Cr. App. 1980). As the Court pointed out on appeal of this case in Barefoot, supra, the State may assume the facts in a hypothetical question in accordance with her theory of the case and that if the opponent desires to solicit an opinion upon a different set of facts, he is entitled to do so. The fact that the Petitioner did not or could not does not render the opinion inadmissible. This Court is further of the opinion that the psychiatrists were presented with "psychiatric and psychological facts and history" concerning the Petitioner. The Psychiatrists were asked to assume as true in a lengthy hypothetical question many facts established at trial about the Petitioner including his prior convictions, his reputation for peaceful and lawabiding citizenship spanning several years in five different states and his conduct prior, during and after the commission of the offense. Each Psychiatrist was then asked if he could state an opinion on the basis of those facts assumed to be true and each indicated he could. No evidence was presented by the defense that a psychiatrist could not state an opinion on the facts assumed to be true.

The Court is of the opinion that the testimony of psychiatrists on the punishment issues was admissible and that no error is shown.

G

In his eleventh point of error, the Petitioner complains that Article 37.071 V.A.C.C.P. violates the Sixth, Eighth and Fourteenth Amendments to the Federal Constitution "because it contains no provisions for directing and instructing the jury's consideration of mitigating circumstances at the punishment phase of the trial and is heavily weighted in favor of the State by focusing the jury's consideration on the aggravating circumstances".

The Petitioner argues that the evidence introduced suggested that the Petitioner was intoxicated or under the influence of morphine during the commission of the offense and that the Court erred in failing to specially submit this possible mitigating evidence to the jury on the punishment issues. It must first be noticed that no objection was made to the punishment charge on the grounds now urged nor was any request for a special instruction made.

The Court instructed the jury, moreover, that they may consider on the punishment issues all evidence admitted during the guilt/innocence and punishment phases of the trial. No special instructions singling out possible mitigating or aggravating evidence is required and if done would amount to a comment on the weight or the evidence.

CONCLUSION

Having considered the Petitioner's Application for Writ of Habeas Corpus the State's Answer filed thereto, this Court is of the opinion that the Application is without merit and should be denied.

The Clerk is directed to compile a transcript including the indictment, judgment, sentence, and death warrant in this case together with a copy

of the Petitioner's Application for Writ of Habeas Corpus, the State's Answer and this order to the Court of Criminal Appeals in Austin, Texas. The Clerk is further directed to serve a copy of this order upon Petitioner by mailing a copy of Petitioner's Attorney, Will Gray, P. O. Box 613, Simonton, Texas 77476.

Signed this the 6th day of October, 1981.
at 4:30 P.M.

William M Blakely
JUDGE PRESIDING

NO. 26,812-A

EX PARTE	§	IN THE 27TH DISTRICT COURT
	§	OF
THOMAS A. BAREFOOT	§	BELL COUNTY, TEXAS

STATE'S ANSWER

COMES NOW the State by and through her District Attorney and files this the State's Answer to the Applicant's Petition For Post Conviction Writ Of Habeas Corpus and would show the Court as follows:

FILED
11 o'clock a.m.
OCT 6 1981
D. CALDWELL
District Clerk, Bell County, Texas
By [illegible] Deputy

I.

HISTORY OF THE CASE

The Applicant is presently in the Texas Department of Corrections by virtue of a judgment and sentence issued from the 27th District Court of Bell County, Texas in Cause No. 26,812 wherein the Applicant was charged with capital murder. On Novmeber 14, 1978, the Applicant was tried before a jury which found him guilty of capital murder and answered the two special issue questions on punishment in the affirmative. Upon automatic appeal to the Court of Criminal Appeals, the conviction was affirmed on June 2, 1980 in Cause No. 63,713 and the opinion is reported in State v. Barefoot, 596 S.W.2d 875 (Tex. Cr. App. 1980). Thereafter the Applicant was sentenced to die by injection before sunrise on September 17, 1980.

On July 29, 1980, a stay of execution was granted by the Supreme Court of the United States pending the filing of a Petition For Writ Of Certiorari. The Petition was filed in Cause No. 805,320 on August 27, 1980 and on June 29, 1981 the Petition was denied and the stay of execution was dissolved. On August 14, 1981 the Applicant was again sentenced to death by the trial court which set his execution sometime before sunrise on October 13, 1981.

II.

FACT STATEMENT

A

On Guilt And Innocence

On August 7, 1978 Donnie Ray Tiller and Robert Roberson lived in a trailer owned by them located in the Elm Grove Trailer Park in Killeen,

App. D

Texas. Residing with them was Radene Layto, Deborah Forbes and the Defendant who began living at the trailer in June under the assumed name of Darren Collier (SF 1399-1408). During the summer of 1978, the Defendant asked Tiller many times to get him a gun (SF 1412) and often talked to both Tiller and Roberson about wanting to commit robberies in Harker Heights, Texas, a city contiguous to Killeen (SF 1414, 1512). The Defendant also told Tiller that he had been roughed up during an arrest for public intoxication in Harker Heights and that Tiller would be reading about him in the newspaper for killing a Harker Heights police officer (SF 1413-1414).

At approximately 2:00 p.m. August 6, 1978, the day before the murder, the Appellant told Donnie Ray Tiller that he planned to rob the Oasis Club in Harker Heights on the morning of August 7, 1978 and to create a diversion for the police by setting fire to or blowing up a building in Harker Heights (SF 1415-1418). The Defendant left the trailer at 4:00 p.m. August 6, 1978 (SF 1419-1420) and at 4:00 a.m. August 7, 1978, Donnie Ray Tiller went to work at the Yellow Cab Company in Killeen, Texas as a dispatcher (SF 1423).

Robert Roberson was also employed by the Yellow Cab Company (as a driver) and began work at 5:00 p.m. Sunday, August 6, 1978 and finished at 4:15 a.m. August 7, 1978 (SF 1514-1515). He returned to the trailer at 4:30 a.m. using Tiller's car and went to bed with Debbie (SF 1516). The Defendant then arrived at the trailer, aroused Roberson out of bed and asked him for a ride to Harker Heights. The Defendant was wearing a white T-shirt, Levi blue jeans, a pair of pointed toe boots and had in his possession a homemade bomb, a plastic milk jug and a fully loaded .25 automatic pistol which he carried in his back pocket (SF 1517-1521). Roberson agreed to drive Defendant to Harker Heights and on the way Appellant told Roberson that he was going to blow up the Silver Spur located on Highway 190 in Harker Heights (SF 1522). Roberson drove the Defendant to Mickey's Number Four, a drive-in grocery in Harker Heights near the Silver Spur so that Defendant could buy some gas. Refusing to carry Defendant to the Silver Spur, Roberson left him armed with a .25 caliber pistol and a gallon of gasoline at the drive-in store and returned to the trailer with the homemade bomb which Defendant inadvertently left in the car (SF 1524-1528).

At 5:15 a.m. August 7, 1978, John Edwards, a soldier at Fort Hood, Texas who resided in Harker Heights left for Fort Hood driving his usual route which took him past the Silver Spur (SF 1158-1168). As Mr. Edwards drove towards Business Highway 190 and approached the Silver Spur, he observed flames coming from the roof of the club and the Defendant facing the fire standing on the edge of the parking lot next to Highway 190 (SF 1168-1174). No one else was present in the area (SF 1171-1172). As Mr. Edwards started to turn on Business Highway 190, the Defendant turned and ran across the highway (SF 1174-1177). Mr. Edwards drove to the police station, informed the police about the fire and then returned to the scene of the fire (SF 1179-1183). As Mr. Edwards was driving down Business Highway 190 towards the fire, he observed the Defendant running down the highway towards the intersection of Amy Lane (SF 1194-1197). At the scene of the fire, Mr. Edwards observed a fire inspector remove a melted plastic jug from the roof of the burning building (SF 1189-1190). After this observation was made, Mr. Edwards informed the victim, Officer Carl Levin, of what he knew about the fire including observing the Defendant at the scene of the fire and later again near Amy Lane. The uniformed officer then left in his marked patrol car down Highway 190 towards Amy Lane (SF 1194-1197).

Mr. Michael Trash, a soldier at Fort Hood, lived on Amy Lane and at 5:35 a.m. August 7, 1978, he left for Fort Hood on foot walking down Amy Lane. While walking, he observed a patrol car with emergency flashers on, parked on Amy Lane at the intersection of Valley Road (SF 1219-1227). The spotlight of the patrol car was on some bushes and Mr. Thrash observed a man wearing blue jeans and a white T-shirt (SF 1245) walk out of the bushes into the spotlight and approach a uniformed police officer who was standing next to the patrol car (SF 1228-1231). As the two were talking within two feet of each other, the man who appeared out of the bushes shot the police officer in the head without provocation at point blank range (SF 1237-1243). The uniformed police officer fell to the ground and the assailant fled, running down Valley Road. Mr. Thrash ran to the patrol car to help the officer, summoned assistance over the police radio and pursued the assailant a short distance loosing him (SF 1243-1246). Carl Levin, the police officer, died beside his patrol car (SF 1253) with his gun still strapped in his

holster (SF 1331). A shell casing was found between his body and his patrol car (SF 1252). The autopsy revealed that Carl Levin died from a bullet fired at close range that entered the left side of his forehead two inches above his left eyebrow and passed through his brain (SF 1743-1753). The projectile was recovered (SF 1752) and ballistic tests established that it was fired into the head of Carl Levin from a distance of 3-6 inches (SF 1780).

Mary Richards lived on Valley Road near the intersection of Amy Lane and while in bed before 5:45 a.m., she heard a shot. Mrs. Richards looked out her bedroom window facing the street and observed a man resembling the Defendant wearing a white T-shirt (SF 1277) running down Valley Road away from Amy Lane (SF 1258-1269). While Mrs. Richards stated that she could not positively identify the fleeing man, Mrs. Richards described the man as about five feet five inches to five feet seven inches tall having a muscular build and wavy, course hair and pointed out the Defendant as resembling him (SF 1265-1269).

At approximately 10:45 a.m. the same morning, after hearing the news on the radio, Donnie Ray Tiller received a phone call at the office of the Yellow Cab Company from the Defendant (SF 1426-1428). With reference to the shooting of the police officer in Harker Heights earlier that morning, August 7 (SF 1432), the Appellant told Mr. Tiller "I shot him. I killed the mother fucker. I shot him in the head." (SF 1429). The Defendant asked what he should do and stated that he was calling from the Gibson's Store on Highway 190 and that he would call back. After this conversation, Mr. Tiller talked with Detective Carl Trippet of the Killeen Police Department and related to him the information received from Appellant (SF 1430).

Later the same morning, three police officers went to the trailer belonging to Tiller and Roberson looking for Defendant and awoke Roberson. The Defendant was not there and after the officers left, Roberson went back to bed only to be awaken again but this time by the Defendant (SF 1529-1532). The Defendant was dressed like he was when Roberson last saw him, wearing a white T-shirt, blue jeans and boots but his face, mustache and white T-shirt were speckled with blood (SF 1532-1533). The Appellant was in a state of panic (SF 1534) and Mr. Roberson told him that the police were looking for him. The Defendant then told Mr.

Roberson that he had to get out of town because "he wasted a cop, that he killed a cop." (SF 1533). Mr. Roberson asked him how he killed the police officer and the Defendant demonstrated how he committed the crime by putting his hand in his back pocket, pulling his hand out and putting his finger against Roberson's head at the place that corresponded to the bullet wound on the head of the slain officer (SF 1534-1535). The Defendant then washed up, changed clothes wearing blue jeans, a brown knit-shirt and a jean vest and left the trailer (SF 1535-1538).

On the morning of August 7, 1978, Francisco Hernandez met the Defendant on a street in downtown Killeen. The Defendant told Mr. Hernandez that he had lost his job and got kicked out of the Star Motel where he was staying with a friend (SF 1599-1602). Mr. Hernandez invited the Appellant to his home where the Defendant ate lunch, slept in the afternoon and stayed the night (SF 1604-1610). The next morning, August 8, 1978, Mr. Hernandez listened to the news broadcast on the radio which described the Defendant and then inquired, "That's you they're looking for." The Defendant stated "I am the one that they're looking for, but I didn't kill no policeman." Mr. Hernandez asked Defendant to turn himself in but he refused (SF 1612-1614). Mr. Hernandez asked Defendant to leave and Defendant shaved off his mustache and changed into another shirt that Hernandez gave him (SF 1615-1616). They then left Killeen and went to the bus station in Belton, Texas where Defendant decided to take the next bus to Houston. Mr. Hernandez left the Defendant in Belton and hitchhiked to Austin where Mr. Hernandez went to the police station and informed the police that the bus carrying the Defendant would arrive in Houston at 11:30 p.m. (SF 1617-1628).

Texas Rangers, Don North and William Walk, and Houston Police Officers, J.L. Davis, H.E. Gaas and R.V. Holdereith, arrested the Defendant in the Houston Greyhound Bus Station shortly after 11:20 p.m. August 8, 1978 (SF 1662-1672). A fully loaded .25 caliber automatic pistol was found in Defendant's right rear pocket (SF 1675-1680). Ballistic tests revealed that the projectile that killed Officer Carl Levin and the shell casing found beside the body of the slain officer were fired from the pistol taken from the Appellant (SF 1781-1782). It was also established that Carl Levin was the only police officer killed in all of Bell County, August 7, 1978 (SF 1813).

To show the Defendant's motive in killing Officer Carl Levin, the State presented evidence that the defendant had been arrested and indicted in New Mexico for the offenses of sexual penetration of a minor and kidnapping and that while waiting for trial on those charges, he escaped from jail. (The State gave the Defendant notice on October 16, 1978 that the State intended to prove that the Defendant was charged by indictment with the offense of rape and kidnapping of a child and that while waiting trial in New Mexico on those charges, he escaped from jail. TR 193). Mr. Mike Roach testified that he was a peace officer for Grants, New Mexico and that on October 29, 1977 he arrested the defendant in New Mexico for the offense of sexual penetration of a minor and carried him before a magistrate (SF 1113-1117).

Judge John Horececk testified that he is a magistrate of Valencia County, New Mexico and that on November 1, 1977 he arraigned the Defendant for the offense of sexual penetration of a minor and kidnapping, that he informed the Defendant that the maximum penalty for the sexual penetration was life imprisonment and that the punishment for kidnapping was from five to fifteen years imprisonment and that he committed the Defendant to the Valencia County jail in lieu of $100,000.00 bond (SF 1118-1122).

Mr. Lorenz Romero, the Sheriff of Valencia County, New Mexico, testified that the Defendant was incarcerated in the Valencia County Jail and that on January 19, 1978, the Defendant escaped (SF 1122-1125). Ronald Childress, testified that he represented Thomas A. Barefoot upon the indictment in Cause No. 4374-C pending against him for sexual penetration of a minor and kidnapping and that the case was set for trial for the week of January 30, 1978 (SF 1125-1131).

Velma Hardisty, a dispatcher and jailer for the Valencia County Jail, testified that during the early morning hours of January 19, 1978 she heard noices coming from the back of the jail and later discovered that the Defendant and another prisoner had escaped (SF 1130-1137).

Deputy Sheriff Daniel Fox testified that the Defendant and a fellow prisoner escaped by knocking a hole in their cell wall, entering an adjoining cell on which the door was opened and escaping out a window that they removed (SF 1138-1142).

The State introduced in evidence a copy of the indictment in Cause No. 4374-C, styled The State of New Mexico v. Thomas Andy Barefoot,

charging the Defendant with Rape, Sexual Abuse and Kidnapping Of A Child (SF 2233), a copy of the arraignment in Cause No. 4374-C (SF 2235), a copy of the indictment in Cause No. CR78-40, styled The State Of New Mexico v. Thomas Barefoot, charging the Defendant with Escape (SF 2236) and a copy of the warrant for the arrest of the defendant for Escape that issued in Cause No. CR78-40 (SF 2237).

B

On Punishment

The State proved at punishment that the Defendant had been previously convicted of the following offenses:

(1) Possession of an unregistered firearm on October 24, 1975 in Cause No. 75-164 in the United States District Court for the Western District of Oklahoma for which the Defendant was sentenced to one year in prison, (SF 1964-1966, exhibit 49, SF 2349),

(2) Possession of amphetamines on December 2, 1974 in Cause No. 36858 in the 15th Judicial District Court of LaFayette Parish, Louisiana for which the Defendant was sentenced to 5 years, the imposition of which was suspended for 5 years on the condition that he serve one year in jail and 5 years on probation (SF 1968-1971, exhibit 52, SF 2394),

(3) Distribution of marihuana on December 2, 1974 in Cause No. 37573 in the 15th Judicial District Court of LaFayette Parish, Louisiana for which the defendant was sentenced to serve 5 years, the imposition of which was suspended for 5 years on the condition the Defendant serve one year in jail and 5 years on probation (SF 1968-1971, exhibit 53A, SF 2395),

(4) Possession of marihuana in Cause No. 36859 on November 26, 1974 in the 15th Judicial District Court of LaFayette Parish, Louisiana for which the Defendant was sentenced to serve 6 months in jail (SF 1971-1972), exhibit 63, SF 2526),

(5) Carrying a concealed weapon in Cause No. 37572 in the 15th District Court of LaFayette Parish, Louisiana on November 26, 1974 for which the Defendant was sentenced to serve 6 months in jail (SF 1973-1974, exhibit 62, SF 2525).

The State also offered evidence of the Defendant's reputation for peaceful and lawabiding citizenship. The State proved through the testimony of John P. Clausen that the Defendant had a bad reputation for peaceful and lawabiding citizenship in 1969 when he resided in Morgan City, Louisiana (SF 1975-1978). The State proved through the testimony of Louis Belaire that the Defendant had a bad reputation for peaceful and law abiding citizenship in 1972 in New Iberia, Louisiana (SF 1978-1979). The State proved through the testimony of Danny Brown that the Defendant had a

bad reputation for peaceful and law abiding citizenship in 1973 in LaFayette, Louisiana (SF 1980-1982). The State proved through testimony of Carl J. Primeaux that the Defendant had a bad reputation for peaceful and law abiding citizenship for the years 1973 through 1974 in New Iberia and LaFayette, Louisiana (SF 1983-1987). The State proved through the testimony of Chester Childs that the Defendant had a bad reputation for peaceful and law abiding citizenship in 1975 in Oklahoma City, Oklahoma (SF 1988-1990). The State proved through the testimony of Dorece Green that the Defendant had a bad reputation for peaceful and law abiding citizenship in 1976 in Odessa, Texas (SF 1991-1994). The State proved through the testimony of Sheriff A.C. Gaston and Jack Barton that the Defendant had a bad reputation for peaceful and law abiding citizenship in 1977 in Woodward, Oklahoma (SF 1995-2000). The State proved through the testimony of Bob Olive that the Defendant had a bad reputation for peaceful and law abiding citizenship in 1977 in Neodesha, Kansas (SF 2001-2003). Finally, the State proved through the testimony of Thomas Esquibel and James Trost that the Defendant had a bad reputation for peaceful and law abiding citizenship in 1977 in Valencia County, New Mexico (SF 2004-2009).

The State also offered psychiatric testimony. Dr. James Grigson and Dr. John Holbrook testified on the basis of facts assumed as true in a hypothetical question that the Defendant is a sociopath and is likely to commit criminal acts of violence in the future.

The defense presented no testimony on punishment.

III.

NECESSITY FOR AN EVIDENTIARY HEARING

There is no necessity for an evidentiary hearing for the reason that there is no fact in issue that cannot be ascertained with certainty from the record.

IV.

COUNTERPOINTS

Counterpoint One

The Applicant complains in points of error one and three that venireperson Ruby Sanders was excluded in violation of Witherspoon v. Illinois, 391 U.S. 510 (1968) and Adams v. Texas, ___ U.S. ___, 100 S.Ct. 2521 (1980).

The Applicant, however, failed to object to the exclusion of prospective juror Sanders and any error was waived. Wainwright v. Sykes, 433 U.S. 72 (1977). Relying upon Estelle v. Smith, ___ U.S. ___ (1981), the Applicant argues that no objection was required because an objection would be futile in as much as the time of trial the Texas Court of Criminal Appeals failed to recognize that excluding a juror for failure to swear that his beliefs would not affect his deliberation on any issue of fact was error as established in Adams v. Texas.

Admas error is a type of Witherspoon error and the Applicant objects that prospective juror Ruby Sanders was wrongfully excluded in violation of both Adams and Witherspoon independent of Adams. The Applicant alleges that prospective juror Sanders was excluded because the Court believed that she could not take the 12.31 (b) oath and also because the record does not affirmatively reflect that she would irrevocably and automatically vote against imposing death. Assuming that exclusion of prosepctive juror Ruby Sanders under Adams v. State requried no objection, it does not follow that a trial objection was not required to the alleged independent Witherspoon error. The principles of Witherspoon have been a part of our law since 1968 and a trial objection to its alleged violation is always required. The Witherspoon error is thus waived by the failure to object. Because Adams error is a type of Witherspoon error, moreover, the Adams error was also waived for the same reasons by the failure to object.

Turning to the merits of the Applicant's complaints, the State submits that venireperson Ruby Sanders was not wrongfully excluded in violation of Witherspoon or Adams. The record reflects that Sanders was asked the following question and responded with the following answer (SF VIII 1892):

> Q And that's why we're asking you all these questions, Mrs. Sanders. Do you feel then that no matter what the facts in any case might show that you, if you were on the jury, if someone forced you to be on that jury, that you could never vote in a case that would assess the death penalty on somebody because of what you believe and what you have already told me?
>
> A Yes, sir, that's right. I don't think that I could—feel right even if I was on a jury and convicted an individual, I don't think that my conscience would allow me to continue to live on knowing that I am sentimental and believe in capital punishment or death or into this world.

The State submits that Ruby Sanders was properly excluded.

Counterpoint Two

The Applicant alleges in point of error number two that the Applicant failed to receive effective assistance of counsel for the reason that counsel failed to object to the State's challenge for cause to prospective juror Ruby Sanders.

In as much as the prospective juror was properly excluded for cause it is difficult to fault counsel for the defense for failing to object.

Counterpoint Three

The Applicant next alleges in points four and five that he was denied due process of law and effective assistance of counsel for the reason that counsel for defense failed to render effective assistance of counsel during the voir dire. The Applicant's chief complaint against defense counsel is that they did not understand and apply the principles of Witherspoon v. Illinois, ___ U.S. ___ 88 S.Ct. 1770 (1968) in selecting the jury.

Witherspoon requires that the penalty assessed in a capital case must express the conscience of the community. Where prospective juror's who merely have conscientious or religious scruples against the imposition of the death penalty have been excluded, the resulting jury is organized to return a verdict of death and no longer expresses the conscience of the community. Thus, the State may not exclude from jury service a prospective juror who has conscientious or religious scruples against the death penalty if he is willing to consider the imposition of the death penalty. Unless the prospective juror is irrevocably committed before the trial has begun to vote against the death penalty regardless of the evidence that might be shown, he may not be excluded from jury service because of his conscientious or religious scruples against capital punishment. Put another way, prospective jurors who have conscientious and religious scruples against the death penatly may not be excluded for cause unless it is unmistakably clear "(1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt." Witherspoon, however, does not require any particular formalized answer by the prospective juror before he may be excluded for cause because he cannot consider the

death penalty. Vanderbilt v. State, ___ S.W.2d ___ (September 23, 1981); Tezeno v. State, 484 S.W.2d 374 (Tex. Cr. App. 19). There are no magic words.

The record of the voir dire clearly shows that defense counsel correctly understood and applied the principles of Witherspoon in selecting the jury in this case. Consider the examination of Glenda S. Ayers (SF IV, 867-905). After establishing that venireperson Ayers had religious objections to the death penalty, the following transpired upon examination by Mr. Leitner for the State (SF IV, 877-878),

> ... Would you automatically answer one of those two questions no, knowing in your own mind and heart if you answered them yes he would have to die by injection?
>
> A I would simply have to say no to both of them.
>
> Q Okay. Then no matter what the facts and circumstances were in any case, you would make sure that you were not a party to sending somebody to their death because only God has that right; is that correct?
>
> A That's right.
>
> Q And you would answer one of those two questions no, no matter what the facts and circumstances--or, either answer them no, no matter what the facts and circumstances show, just so this person would have to then spend the rest of his life in the penitentiary; is that correct?
>
> A That's right.
>
> Mr. Leitner: The State, Your Honor, would submit the juror for cause at this time.

Mr. Brown then examined the witness for the defense and rehabilitated her (SF IV, 878-879),

> Q All right. Mrs. Ayres, you understand that when taking an oath as a juror, that the judge asks you under oath to swear that you will follow the law that is given to you in the case?
>
> A That's right.
>
> Q Now, as part of following the law in the case, you will be asked to answer certain factual inquiries at the guilt or punishment stage; you will be asked to determine guilt or innocence based upon your determination of certain facts which are incorporated into these questions.
>
> Now, is what you're telling this Court is, even though--is that you cannot take that oath--you cannot take that oath, that you will follow the law?
>
> A Yes. I would take the oath if I am— you said if I'm asked to follow the law? Yes, I would take the oath and follow what is to be.
>
> Q All right. If the law requires you to make certain factual determinations, the question that we're trying to get at here is whether or not your thoughts about the death penalty would influence these determinations of fact that you have to make as a juror.

Would you be influenced by the death penalty to the extent where you couldn't return an honest answer, or a true answer, to the facts that you would have to determine?

A No, I wouldn't be influenced.

After Mr. Brown showed that the prospective juror was qualified under Witherspoon, subsequent examination by the Court and the State also revealed that prospective juror Ayers was qualified. The State then inquired into the subject of the venireperson's legal exemption because of a child under 10 years of age. Defense counsel objected to the inquiry and the subject was dropped by the State (SF IV, 884). The State subsequently established that the prospective juror could not consider any penalty less than 40 years for the offense of murder and challenged Mrs. Ayers for cause (SF IV, 897-900). Mr. Brown attempted to rehabilitate the prospective juror with an example of a wife who kills her husband who had been beating her but Mrs. Ayers stated she could not consider the minimum punishment of 5 years whereupon Mr. Brown had no objection to excusing the prospective juror (SF IV, 900-905).

The Petitioner also faults trial counsel for agreeing to excuse several prospective jurors and for failing to attempt to rehabilitate others who were shown to be disqualified under Witherspoon. The fact that Applicant's present counsel would not have excused some of the prospective jurors or would have attempted to rehabilitate others does not demonstrate incompetency of counsel. The standard of effective assistance of counsel is "... not errorless counsel and not counsel judged ineffective by hindsight but counsel reasonably likely to render and rendering reasonably effective assistance." MacKenna v. Ellis, 280 F.2d 592, 599 (5th Cir. 1960); Ex Parte Gallegos, 511 S.W.2d 510 (Tex. Cr. App. 1974). The fact that other counsel would have done differently is not the test. Williams v. Beto, 354 F.2d 698 (5th Cir. 1968). The Applicant also faults trial counsel for failing to object to the State's questions to prospective juror, Bonnie McIver, as to whether she wanted to claim her legal exemption for children under ten but Applicant gives trial counsel no credit for objecting to and preventing such inquiry to venireperson Glenda Ayers (SF IV, 884).

The Applicant, moreover, would have the assistance of trial counsel measured solely by his performance on voir dire. The applicable standard,

however, against which the sufficiency of an attorney's assistance must be gauged is the totality of the representation and not just a part thereof. Chalk v. Beto, 429 F.2d 225 (5th Cir. 1970); Ewing v. State, 549 S.W.2d 392 (Tex. Cr. App. 1977); Ex Parte Prior, 540 S.W.2d 723 (Tex. Cr. App. 1976). Counsel for the Applicant does not fault trial counsel for anything that occurred after voir dire and, indeed, cannot do so. Considering the totality of the representation, Applicant enjoyed effective assistance of counsel.

Counterpoint Four

The Applicant next alleges in point number six that he was denied his rights under the Sixth and Fourteenth Amendments to the Constitution of the United States for the reason that the trial court failed to sustain his challenge for cause to several prospective jurors who could not consider the minimum punishment of 5 years imprisonment for the lesser included offense of murder and granted a similar challenge by the State to other prospective jurors. The Applicant appears to complain of the rulings to four prospective jurors but a careful reading of the Applicant's Petition reveals only three to which complaint is made.

The Applicant first argues that the trial court erred in failing to sustain the Applicant's challenge to prospective juror Johnnie Kopriva for the reason that he could not consider the minimum punishment of five years for the lesser included offense of murder. The record reflects that upon examination by the State, prospective juror Johnnie Kopriva clearly stated that he could consider the entire range of punishment for the lesser included offense of murder (SF III, 380-382). Then upon examination by the defense, the prospective juror indicated that he could not consider the minimum punishment and was challenged by the defense (SF III, 403). Before the Court ruled on the challenge, the prospective juror was re-examined by the State and given an example of how the facts may differ in murder cases whereupon the prospective juror again indicated he could consider the minimum punishment of five years for the offense of murder (SF III, 403-407). Upon re-examination by the defense, the prospective juror again re-affirmed that he could consider the minimum punishment for murder (SF III, 407). It is submitted, therefore that the Court did not err in overruling the Applicant's challenge on the basis that prospective juror Kopriva could not consider the minimum range of punishment for the offense of murder.

The Applicant also complains that the Court erred in overruling his challenge to prospective juror James Smith for the reason that he could not consider the minimum punishment of 5 years for the lesser included offense of murder. The record reflects that upon examination by the State, the prospective juror stated that he could consider the entire range of punishment for the lesser included offense of murder and that he would let the punishment fit the crime (SF XV, 872-873). Upon questioning by the defense, prospective juror Smith stated he didn't think he could consider as little as five years as punishment for the offense of murder (SF XV, 903-905). In this regard, Smith stated (SF XV, 904):

> I think my answer would have to depend on the facts in the case involved, would it not? That's a hard question for me to answer.

After the juror was challenged for cause, the State upon re-examination gave the prospective juror an example of murder that involved mitigating circumstances whereupon the prospective juror indicated he could consider the entire range of punishment for the offense of murder (SF XV, 906-911). It is submitted, therefore, that the trial court did not err in overruling the Applicant's challenge on the basis that the prospective juror could not consider the full range of punishment for the offense of murder.

The Applicant next complains that the trial court erroneously sustained a challenge to prospective juror Wilbert Baca for the reason that the prospective juror Baca could not consider the entire range of punishment for the lesser included offense of murder. The record reflects that upon examination by the State, the prospective juror stated that he could not consider the minimum punishment of five years for the offense of murder and was challenged by the State (SF IX 2389-2391). Upon examination by the defense it was explained that the offense of murder might include the facts of a mercy killing whereupon the prospective juror stated that he thought he could consider the entire range of punishment (SF IX, 2393-2395) upon re-examination by the State and by the Court, the prospective juror again stated that he could not consider the minimum of five years for the offense of murder (SF IX, 2396-2398):

> Q Okay. Now, Mr. Baca, in the State of Texas, if the State of Texas came forward and proved to you beyond a reasonable doubt that the defendant in a murder case intentionally and knowingly took the life of another individual, do you feel like that you could

consider assessing his punishment of as low as five years in the Texas Department of Corrections in a proper case where the facts justified it and the circumstances warranted it, because only you can answer that, so we've got two answers here, and is that question clear to you?

A Yes, sir.

Q All right.

A I just believe that life is worth more than five years.

Q And however you believe, Mr. Baca, that's according to you.

A That's the way I feel. Now, I may not understand the question just exactly, but I feel like it's worth more than five years.

Q All right, sir. Now, Mr. Baca, if you feel like that a human being's life is worth more than five years, that's your business and nobody else's.

A Right.

Q I don't want to, you know, belabor the point, Mr. Baca, and, gosh, I don't want to make you feel like we are just cross examining this thing, but—

A I understand.

Q But, by gosh, if you don't feel—if you just don't feel like that's enough punishment for somebody that has murdered somebody in any kind of case, then, tell this Court.

A I just don't.

Q And tell me.

A I don't think five years is enough.

The Court: Mr. Baca, I hate to interrupt you, but, we have to have an unequivocal answer.

The Juror: Yes, sir.

The Court: I realize what you think and I appreciate your opinion and respect it. Could you ever consider assessing five years in a case where a person had been convicted of a murder?

The Juror: No. I don't believe.

The Court: All right. I will sustain the State's challenge. You're exused for cause.

Mr. Eads: Thank you very much, Mr. Baca.

The Court: Thank you very much, Mr. Baca. I appreciate your frankness and I sure appreciate your patience.

It is submitted that the Court did not err in excusing the prospective juror. The Applicant, moreover, did not object to the Court's ruling and any error in excusing the juror was waived.

The Applicant further alleges that the record reflects that the State's challenge to prospective juror Baca was "considered under a more liberal standard than that applied to Barefoot's challenges." A careful reading of the record in this regard shows otherwise.

Counterpoint Five

The Applicant next alleges in point seven that "the entire voir dire examination, under the totality of the circumstances, was designed to and did produce a jury organized to return a punishment verdict of death, contrary to the mandate of Witherspoon v. Illinois, 391 U.S. 510 (1968) and in violation of the sixth, eighth and fourteenth amendments to the constitution of the United States."

Witherspoon held that a jury is organized to return a verdict of death when prospective jurors are disqualified form jury service simply because they have conscientious objections to the death penalty. The verdict of a jury so selected does not reflect the expression of the community. In the case at bar, however, no prospective juror was wrongfully excluded in violation of Witherspoon and the resulting jury was thus not organized to return a punishment of death.

Counterpoint Six

The Applicant next alleges in points of error eight, nine and ten that the psychiatric testimony that the Applicant would likely commit future acts of criminal violence which was based solely upon hypothetical questions that contained only the aggravating evidence, none of the mitigating evidence and no "medical, psychiatric or psychological facts of history" was so unreliable that Applicant was deprived of due process of law and subjected to cruel and unusual punishment.

The facts in brief are as follows:

On August 25, 1978, the State filed a motion for a mental examination of the Appliant to qualify expert psychiatric witnesses to testify at trial on the issue whether there is a probability that the Applicant would commit criminal acts of violence that would constitute a continuing threat to society (TR 25). The Applicant answered the State's motion (TR 41) opposing the same and after a hearing on the motion, the motion by the State was denied. On October 6, 1978, twenty-four days before the jury selection process began, the State filed notice on the Applicant that the State intended to offer expert psychiatric opinion at the

punishment phase of the trial (TR 90) and Petitioner filed a motion to test the qualifications of the State's expert witnesses outside the presence of the jury (TR 202-203). The Applicant's motion was granted on October 18, 1978 (TR 203) and a hearing was held outside the presence of the jury prior to the testimony of Dr. James Grigson and Dr. John Holbrook.

At the hearing outside the presence of the jury, both doctors testified that they are licensed by the State of Texas to practice medicine and are self employed psychiatrists, that they graduated from Southwestern Medical School, that they completed their internship at Baylor University Medical Center at Dallas and that they completed their psychiatric residence at Timberlawn Hospital in Dallas (SF 2011-2012, 2045-2046). Dr. Grigson further testified that he taught psychiatry full time at Southwestern Medical School for four years and was a consultant to the Terrell State Hospital for two years, Texas Women's University Health Center for two years and the Dallas County Health Department for three years (SF 2012). Dr. Grigson further testified that he is certified in the field of psychiatry by the American Board of Nuerology and Psychiatry, that he has been in private practice for twelve years, and that during the course of his practice of psychiatry he has examined thousands of individuals charged with felony crimes and of which approximately 400 were charged with murder (SF 2013). Dr. John Holbrook testified further that he was employed as the Chief of Psychiatry of the Texas Department of Corrections for five years, that he has published a number of articles in the field of psychiatry and that during the course of his practice of psychiatry, he has examined approximately 12,000 persons charged or convicted of criminal offenses (SF 2046-2049).

Both Dr. Grigson and Dr. Holbrook testified that they did not examine the Applicant (SF 2014, 2063). Both experts testified, however, that given sufficient facts, they could state an opinion within reasonable medical certainty whether or not an individual would probably commit future acts of criminal violence that would constitute a continuing threat to society without examining that individual (SF 2015-2016, 2051).

Both doctors were asked a hypothetical question (SF 2016-2031) that included the fact that the Applicant enjoyed a bad reputation for

peaceful and law abiding citizenship spanning nine prior years in five states (SF 2018-2019), the fact that the Applicant was convicted in Louisiana in 1974 for the offense of distribution of marihuana, possession of marihuana, possession of methamphetamine and carrying a concealed weapon and in 1975 in Oklahoma for the offense of possession of an unregistered firearm (SF 2017-2018), the fact that seven months before the offense on trial, Applicant escaped from jail in New Mexico while awaiting trial for the offense of rape of a child (SF 2025) and the brutal facts of the offense on trial for which the Applicant showed no remorse. After hearing the hypothetical question, both Dr. Grigson and Dr. Holbrook testified that assuming those facts to be true they could give an opinion within reasonable medical certainty whether there is a probability that the Applicant would commit criminal acts of violence that would constitute a continuing threat to society. The court found the medical experts qualified and after the hypothetical question was asked them in the presence of the jury, they testified that the Applicant was a criminal sociopath and that it is probable that the Applicant would commit criminal acts of violence that constitute a continuing threat to society (SF 2128-2131, 2097-2101).

The Applicant first argues that psychiatric evidence on the issue of dangerousness is inherently unreliable even when based upon a personal examination of the accused. This argument was considered and rejected on direct appeal of this cause. Barefoot v. State, 596 S.W.2d 875 (Tex. Cr. App. 1980). Moreover, in Jurek v. Texas, 428 U.S. 262 (1976), the Supreme Court approved the use of psychiatric testimony on the issue of dangerousness in capital cases. In Estelle v. Smith, ___ U.S. ___ (1981), moreover, the Applicant's argument that psychiatric evidence is inherently unreliable was a threshold question rejected by implication.

The Applicant next argues that if psychiatric testimony based upon personal examination is not inherently unreliable it becomes so if based on hypothetical questions containing only the aggravating evidence, none of the mitigating evidence and "no medical, psychiatric or psychological facts or history and no technical material."

The rule is well established that an expert witness may state an opinion based soley upon facts assumed as true in a hypothetical question without having personally performed any examination Logsdon v. Baker,

517 F.2d 174 (Dist. Col. 1975); Carroll v. Magnolia Petroleum Co., 223 F.2d 657 (5th Cir. 1955); Barefoot v. State, 596 S.W.2d 875 (Tex. Cr. App. 1976); Atkinson v. State, 511 S.W.2d 293 (Tex. Cr. App. 1974). The facts assumed as true in the hypothetical questions take the place of the facts acquired through personal examination by the expert. The Applicant complains, however, that the testimony of the psychiatrists were so unreliable that it violated due process of law because the facts assumed as true in the hypothetical question contained only the aggravating evidence, none of the mitigating evidence and "no medical, psychiatric or psychological facts or history and no technical material." As to the lack of mitigating evidence in the hypothetical questions asked by the State, the Applicant fails to point out what mitigating evidence the State should have included. The rule is well settled, moreover, that a hypothetical question need not embrace all of the facts in evidence but may embrace only those facts in accordance with the proponent's theory of the case. If the opponent desires to solicit the opinion of the expert upon a different set of facts, he is entitled to do so on cross-examination. Woods v. State, 569 S.W.2d 901 (Tex. Cr. App. 1978); Atkinson v. State, 511 S.W.2d 293 (Tex. Cr. App. 1974); Jones v. State, 44 S.W.2d 710 (Tex. Cr. App. 1931). The Applicant knew well in advance of trial, moreover, that the State intended to present psychiatric evidence on punishment through the use of hypothetical questions. After the State's motion for psychiatric examination on punishment issues (TR 25) was overruled, the State filed written notice (TR 90) on October 6, 1978, 24 days before jury selection began, that the State intended to present psychiatric testimony at the punishment phase of the trial. In response to the State's notice, the Applicant filed a motion to test the qualifications of the State's expert witnesses outside the presence of the jury (TR 202-203) which said motion was granted.

Contrary to the Applicant's assertion, moreover, the psychiatrists did testify on the basis of medical, psychiatric and psychological facts known to them about the Applicant. The facts presented to an expert to assume as true in a hypothetical question take the place of a personal examination and provide the expert with sufficient information about the subject to qualify him to state an opinion. In this case, both psychiatrists were asked a lengthy hypothetical question in which they were asked to

assume as true the fact that the Applicant enjoyed a bad reputation for peaceful and law abiding citizenship in five states spanning nine years, the fact that the Applicant previously had been convicted in Louisiana in 1974 for the offenses of distribution of marihuana, possession of marihuana, possession of methamphetamine and carrying a concealed weapon and in Oklahoma in 1975 for the offense of possession of an unregistered firearm, the fact that the Applicant escaped from jail in New Mexico while awaiting trial for the offense of rape of a child and the facts of the offense on trial including the Applicant's conduct before, during and after the killing of Officer Levin. After hearing the hypothetical question, both psychiatrists testified that assuming those facts to be true, they could state an opionion whether there was a probability that the Applicant would commit future acts of criminal violence that would constitute a continuing threat to society. The Applicant did not call an expert witness to testify that he could not state an opinion on the information assumed to be true.

Counterpoint Seven

In his eleventh point of error, the Applicant alleges that Article 37.071 V.A.C.C.P. violates the Sixth, Eighth and Fourteenth Amendments to the United States Constitution "because it contains no provisions for directing and instructing the jury's consideration of mitigating circumstances at the punishment phase of the trial and is heavily weighed in favor of the State by focusing the jury's consideration on the aggravating circumstances."

The Applicant alleges that evidence was introduced that the Applicant was intoxicated or under the influence of morphine at the time of the offense and that the Court erred in not submitting this "possibly mitigating evidence" to the jury on either the "deliberate" or "future dangerousness" penalty issues. Counsel for Applicant does not favor us with a reference to the record where such evidence will be found but assuming such evidence was introduced, the jury was instructed to consider it. The record reflects (TR 366) that the Court instructed the jury on punishment as follows:

> You are further instructed that in determining each of these special issues you may take into consideration all of the evidence submitted to you in the full trial of the case, that is, all of the evidence submitted to you in the trial of the first phase of this case, wherein you were called upon to determine the guilt or innocence of the defendant, and all of the evidence, if any, admitted before you in the second phase of the trial, wherein you are called upon to determine the special issues hereby submitted to you.

Article 37.071 V.A.C.C.P. provides, moreover, that at the punishment phase of a capital murder case, "evidence may be presented as to any matter that the Court deems relevant to sentence." The Texas Court of Criminal Appeals has consistently construed this provision to allow the introduction of any relevant evidence in mitigation of punishment. No evidence offered by the Applicant in mitigation of punishment was rejected by the trial court in this case. A special instruction to the jury singling out mitigating evidence for their consideration is not required for a fair determination of the punishment issues. Such an instruction was not requested by trial counsel and any error in failing to specially instruct the jury on the consideration of mitigating evidence was, therefore, waived. It should be pointed out, moreover, that no special instruction singling out aggravating circumstances for the jury's consideration was submitted. The singling out of mitigating or aggravating evidence by the Court for the jury's consideration would amount to a comment on the weight of the evidence and truly violate the defendant's right to a fair determiniation of the issues.

V.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, the State prays that the Applicant's Petition For Writ Of Habeas Corpus be and in all things denied.

Respectfully submitted,

Ralph Petty, Jr.

Ralph Petty, Jr.
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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the State's Answer to Applicant's Petition For Writ Of Habeas Corpus has been sent by certified mail to the Attorney of Record in this cause, Mr. Will Gray, P. O. Box 613, Simonton, Texas, 77476, on this the 6th day of October, 1981.

Ralph Petty, Jr.
Assistant District Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

DEC - 8 1982

CHARLES W. VAGNER, Clerk
By Deputy

THOMAS A. BAREFOOT, §
Petitioner §
§
vs. § CIVIL ACTION NO. W-81-CA-191
§
W. J. ESTELLE, JR., §
Respondent §

ORDER

CAME ON to be considered this day Respondent's Motion to Vacate Stay of Execution; and the Court, having considered the Motion, is of the opinion that it has merit and should be granted.

The Court entered a stay of execution in this cause on October 9, 1981, pending further order of the Court, so that the Court might have a full and fair opportunity to consider the merits of Petitioner's claims. The Court has considered those claims and in orders entered November 12, 1981, found them all to be without merit. The purpose for which this stay of execution was originally entered, therefore, no longer exists. Accordingly, it is hereby ORDERED, ADJUDGED, and DECREED that Petitioner's stay of execution should be, and the same hereby is, VACATED.

SIGNED and ENTERED this 4th day of December, 1982, at Midland, Texas.

Lucius D. Bunton

LUCIUS BUNTON
United States District Judge

Rec'd
12/9/82
dml

App. E

NO. 82-1680

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

THOMAS A. BAREFOOT,

Petitioner-Appellant

V.

W. J. ESTELLE, JR.,

Respondent-Appellee

On Appeal From The United States District Court
For The Western District Of Texas, Waco Division

RESPONDENT'S RESPONSE TO PETITIONER'S MOTION FOR STAY OF EXECUTION

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ATTORNEYS FOR RESPONDENT-APPELLEE

App. F

STATEMENT REGARDING ORAL ARGUMENT

This is an appeal from an order denying an application for writ of habeas corpus brought by a state prisoner under 28 U.S.C. §2254. Petitioner is now incarcerated on Death Row in the Ellis Unit of the Texas Department of Corrections. He is scheduled to be executed sometime before sunrise on January 25, 1983.

In his effort to convince the Court that his appeal presents a substantial issue, Petitioner raises only one issue that is properly before the Court: the use of expert psychiatric testimony, based solely upon hypothetical questions, presented by the prosecution at the punishment stage of his bifurcated trial. Respondent, fully aware of the importance of the case, believes that the Court need only study the opinion of the district court and the briefs of the parties to conclude that no substantial issue is presented. Oral argument, therefore, is not requested. If the Court nevertheless believes that oral argument is appropriate, Respondent would welcome the opportunity to further explicate why denial of Petitioner's motion for stay of execution in this case is in the interest of justice.[1/]

1/ Respondent has learned that oral argument has been set for January 19, 1983, in Houston, Texas.

NO. 82-1680

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

THOMAS A. BAREFOOT,

Petitioner-Appellant

V.

W. J. ESTELLE, JR.,

Respondent-Appellee

On Appeal From The United States District Court
For The Western District Of Texas, Waco Division

RESPONDENT'S RESPONSE TO PETITIONER'S MOTION FOR STAY OF EXECUTION

TO THE HONORABLE JUDGES OF THE COURT OF APPEALS:

NOW COMES W. J. Estelle, Jr., Director, Texas Department of Corrections, Respondent-Appellee herein (hereinafter, "Respondent"), by and through his attorney, the Attorney General of Texas, and submits this his response to Petitioner's motion for stay of execution.

STATEMENT OF THE CASE

A. Course Of Proceedings In The Courts Below

The district court's opinion sets forth the state and federal procedural history of this case up to November 12, 1982, the date it was entered. (Appendix A to Respondent's Response to Petitioner's Motion for Stay of Execution).[2/] Essentially, Petitioner had been convicted of murder and the Texas Court of Criminal Appeals had affirmed the judgment. The United States Supreme Court had denied a petition for writ of certiorari. Petitioner had filed one state application for writ of habeas corpus pursuant to Tex. Code Crim. Proc. Ann. art. 11.07. Relief was denied by both the trial court and the Texas Court of Criminal Appeals.

Petitioner filed notice of appeal and an application for certificate of probable cause on November 24, 1982. On December 8, 1982, upon Respondent's motion the district court vacated its previously entered stay of execution. (App. E). On December 13, 1982, the district court found probable cause for an appeal under Rule 22(b), Federal Rules of Appellate Procedure.

2/ Appendix A, hereinafter "App. A", is the opinion of the district court. App. B is the opinion of the Texas Court of Criminal Appeals affirming the judgment of conviction. This opinion is published as Barefoot v. State, 596 S.W.2d 875 (Tex.Crim.App. 1980)(en banc). App. C is the order of the state convicting court entered on October 6, 1981, rejecting Petitioner's state application for writ of habeas corpus filed pursuant to Tex. Code Crim. Proc. Ann. art. 11.07. App. D is the State's Answer in that habeas corpus proceeding. App. E is the district court's order vacating the previously entered stay of execution.

Petitioner has attached eleven exhibits to his motion for stay. These will be referred to as "Ex. A-K."

On December 20, 1982, the state convicting court sentenced Petitioner to die sometime before sunrise on January 25, 1983, pursuant to Tex. Code Crim. Proc. Ann. art. 43.14. The same day, he filed an original application for writ of habeas corpus in the Texas Court of Criminal Appeals. It was denied the following day. On January 11, 1983, Petitioner filed a motion for stay of execution in the Texas Court of Criminal Appeals. It was denied the same day. Petitioner's case has now been reviewed by the state convicting court once, the Texas Court of Criminal Appeals four times -- once on direct appeal and three times upon collateral attack -- by the United States Supreme Court once, and by federal district court once.

B. Statement Of Facts

Two excellent, detailed statements of the state's case against Petitioner are available to the Court. The Court of Criminal Appeals summarized the important evidence in Barefoot v. State, 596 S.W.2d 875, 878-80 (Tex.Crim.App. 1980)(App. B). The state's answer in Petitioner's first state habeas corpus application also discussed the evidence against Petitioner. (App. D at 1-8).

Essentially, Petitioner was shown at trial to have committed many dangerous crimes in several states. Witnesses at trial testified that Petitioner, before committing the crimes for which he received the death penalty, talked about

committing robberies and killing police officers. The day before he killed Officer Carl Levin, he told a witness, Donnie Tiller, that he planned to rob the Oasis Club in Harker Heights, Texas, the next morning and to create a diversion for the police by setting fire to or blowing up a building in Harker Heights. A different witness, Robert Roberson, testified that on the morning of the crime, Petitioner said that he was going to blow up the Silver Spur nightclub as his diversionary tactic. Roberson gave Petitioner a ride to a drive-in grocery in Harker Heights near the Silver Spur where Petitioner filled a plastic milk jug with gasoline. Petitioner also had a homemade bomb and a fully loaded .25 caliber automatic pistol which he carried in his back pocket. He was dressed in blue jeans and a white T-shirt. A few minutes later, a fire broke out in the Silver Spur. Yet another witness, John Edwards, positively identified Petitioner running away from the fire. Still another, Michael Trash, testified that he saw a man wearing blue jeans and a white T-shirt walk out of some bushes near the scene of the fire, approach a uniformed police officer standing next to a patrol car, and shoot the police officer in the head without provocation at point blank range.

A few hours later the same morning, Tiller testified that Petitioner called him and stated that he had killed Officer Levin by shooting him in the head. Still during that same morning, Petitioner went to the trailer belonging

to Tiller and Roberson. Roberson observed blood upon Petitioner's white T-shirt. Petitioner stated that he had to get out of town because he had "wasted a cop." Petitioner demonstrated how he committed the crime by putting his hand in his back pocket, pulling his hand out and putting his finger against Roberson's head at the place that corresponded to the bullet wound on the head of the slain officer. Petitioner changed clothes and left the trailer.

Fransico Hernandez testified that he met Petitioner later the same day. The two stayed the remainder of the day and the night in Hernandez's home. The next morning, August 8, 1978, Petitioner and Hernandez listened to a radio broadcast describing Petitioner. Petitioner acknowledged that the police were looking for him but denied that he had killed anyone. Petitioner shaved off his mustache and changed clothing again. Petitioner left in a bus for Houston.

Hernandez informed the police that the bus carrying Petitioner would arrive in Houston at 11:30 p.m. When he was arrested that night, a fully loaded .25 caliber automatic pistol was found in his right rear pocket. A ballistics expert testified that the same gun had fired the bullet that cost Officer Levin his life.

Respondent believes that it is fair to say that the state presented overwhelming evidence of Petitioner's guilt.

At the punishment stage of trial, the state presented, among other things, two psychiatrists, Dr. John Holbrook and Dr. James Grigson. Neither had ever interviewed Petitioner. Each testified that within reasonable psychiatric certainty, Petitioner in the future would commit criminal acts of violence that would constitute a continuing threat to society. Under Tex. Code Crim. Proc. Ann. art. 37.071, the jury was required to find such a probability before a sentence of death could be returned. Both psychiatrists based their opinions solely upon the assumptions they were asked to make in a lengthy hypothetical question asked by the prosecutor. The hypothetical questions essentially summarized all the important evidence at both the guilt or innocence and punishment phases of trial. (Exs. J, K).

RESPONDENT'S RESPONSE TO PETITIONER'S MOTION FOR STAY OF EXECUTION

A. The Applicable Standard

In O'Bryan v. Estelle, 691 F.2d 706 (5th Cir. 1982), this Court recently discussed the standard for the Court's grant of the stay of execution. The Court reiterated that in determining whether to issue a stay, it must consider,

> "(1) Whether the movant has made a showing of likelihood of success on the merits, (2) whether the movant has made a showing of irreparable injury if the stay is not granted, (3) whether the granting of the stay would substantially harm the other parties, and (4) whether the granting of the stay would serve the public interest.

> Ruiz v. Estelle, 666 F.2d 854, 856 (5th Cir. 1982) (Ruiz II) quoting Ruiz v. Estelle, 650 F.2d 555, 565 (5th Cir. 1981)(Ruiz I). See also, Florida Business Men for Free Enterprise v. City of Hollywood, 648 F.2d 956, 957 (5th Cir. 1981); Drummond v. Fulton County Department of Family and Children's Services, 532 F.2d 1001, 1002 (5th Cir. 1976)."

O'Bryan v. Estelle, 691 F.2d at 708. The Court then stressed,

> "While the movant need not always show a 'probability of success on the merits,' he must 'present a substantial case on the merits when a serious legal question is involved and show that the balance of the equities [i.e., the other three factors] weighs heavily in the favor of granting the stay.' Ruiz II, 666 F.2d at 856 (emphasis in original)(quoting Ruiz I, 650 at F.2d at 565)."

Id. The O'Bryan Court then granted the petitioner a stay of execution, finding that a "substantial question" was raised in the appeal, and that the court was unable to give the question an adequate review in the three days remaining before O'Bryan's scheduled execution.

Recently, in Mulligan v. Zant, 531 F.Supp. 458 (M.D.Ga. 1982), a district court adopted and utilized the "substantial likelihood of success" test, in denying an eleven-hour application for stay of execution. Because the court found "no substantial likelihood" that the petitioner was entitled to federal habeas relief, the stay of execution was denied. In Shaw v. Martin, 613 F.2d 487 (4th Cir. 1980), the Eleventh Circuit stated that a "facial showing" of the substance of a claim presented was necessary in order to justify a stay. Indeed, in cases where federal courts have granted stays of execution pending appeal, in each, substantial questions

have been identified. E.g., Booker v. Wainwright, 675 F.2d 1150 (11th Cir. 1982); Goode v. Wainwright, 670 F.2d 941 (11th Cir. 1982); Foster v. Strickland, 515 F.Supp. 22 (N.D.Fla. 1981); Modesto v. Nelson, 296 F.Supp. 1375 (N.D.Cal. 1969); see also, United States v. Restro, 529 F.Supp. 579 (W.D.Pa. 1982).

Very recently, in Brooks v. Estelle, No. 82-1613, this Court twice denied motions for stay of execution, finding no substantial question. The United States Supreme Court reached the same conclusion and denied Brooks's application for stay on December 6, 1982. Brooks v. Estelle, 51 U.S.L.W. 3469 (U.S., Dec. 6, 1982).

As argued below, Petitioner fails to present any substantial question for this Court's review. Thus, Petitioner cannot meet the test necessary to entitle him to a stay of execution as there exists no likelihood of his success on appeal. Additionally, Petitioner has failed to show that the other factors weigh in favor of the granting of the stay of execution.

It is true that the ultimately irreparable injury, death, may be imposed if a stay is denied. This alone, however, is insufficient to entitle Petitioner to the stay, for were this true than the presence of irreparable injury becomes overriding to the exclusion of all other factors. Mulligan v. Zant, supra.

If Respondent is correct in his contention that Petitioner fails to present any substantial issue, the public interest would be disserved by a stay of execution. Petitioner

stands convicted for a capital offense committed approximately four and one-half years ago. Since then, the validity of his conviction and sentence have been in constant litigation. The merits of Petitioner's claims have been before state and federal courts for full review no fewer than seven times. Petitioner's execution previously has been stayed to permit full litigation of his claims. The merits of Petitioner's grounds for federal habeas corpus relief were extensively briefed by the parties in the district court. The district court conducted a full and fair evidentiary hearing to enable Petitioner to present any evidence and argument in support of his claims. Following the hearing and submission of proposed findings of fact and conclusions of law by the parties, the court issued an extensive opinion, discussing in detail each claim raised by Petitioner.

The State of Texas has a substantial interest in bringing these proceedings to a close, and in the enforcement of its valid and lawful judgment. This Court, which must balance the interest of Petitioner and the State, should determine that Petitioner has failed to show that he is entitled to a stay.

B. The Significance Of The Granting of Petitioner's Certificate Of Probable Cause

The district court has granted Petitioner a certificate of probable cause to appeal, a requisite for appellate jurisdiction of habeas corpus cases under 28 U.S.C. §2253

and Rule 22(b), Federal Rules of Appellate Procedure. As the order states, this represents the view of the district court that the appeal is not frivolous. Absence of frivolity is indeed the correct standard for the granting of a certificate of probable cause. Blackmun, "Allowance of In Forma Pauperis Appeals in §2255 and Habeas Corpus Cases," 43 F.R.D. 343 (1967). The granting of a certificate of probable cause by a district court may not be vacated by the Court of Appeals. Nowakowaski v. Maroney, 386 U.S. 542, 87 S.Ct. 1197 (1967).

As discussed above, however, Petitioner is not entitled to a stay of execution unless he can meet the heavier burden of showing a substantial case on the merits involving a serious legal question. A finding of no substantial question would render any appeal useless because its result would be foreordained. In that event, notwithstanding the grant of a certificate of probable cause, a stay of execution should be denied. Petitioner, like other appellate litigants, must bear the risk of the mooting of his appeal if he is unable to obtain a stay pending appeal. See, 11 Wright & Miller, Federal Practice and Procedure, §2905 at 325 et seq. (1973); 9 Moore's Federal Practice, para. 208.07 at 8-26 et seq. (2nd Ed. 1982). Such a result would no more unfairly obliterate the Petitioner's right of appeal than it obliterates the right of appeal of any other appellant who suffers irreparable injury and the mooting of his appeal by virtue of his failure to convince the court that he presents a substantial question for review.

Recently the United States Supreme Court was asked to stay an execution to permit full appellate review after the granting of a certificate of probable cause. The Court declined to do so. Brooks v. Estelle, 51 U.S.L.W. 3469 (U.S., Dec. 6, 1982). Three justices argued, "Petitioner is entitled to a stay of execution in order to protect his right to appeal the District Court's denial of habeas corpus relief," but the other six disagreed. Id. The granting of Petitioner's certificate of probable cause presents no barrier to this Court's denial of his motion for stay of execution.

C. Petitioner's Claims In His Motion

Petitioner appears to urge five matters in satisfaction of his burden to show a substantial issue on appeal. Only one is properly involved in this appeal, as Petitioner apparently concedes.

1. Petitioner first argues that the state convicting court was without jurisdiction to sentence him to be executed, and that because of his confusion, he did not learn that the Court of Criminal Appeals had denied his second habeas corpus application on December 21, 1982, until January 7, 1983. He argues that this delay has caused him irreparable damage and has prevented him from presenting a motion for a stay of execution to either this Court or the United States District Court. (Motion at 3-4).

(a) Petitioner's argument that the state convicting court lacked jurisdiction to sentence him to be executed is

frivolous. He relies upon McNeil v. State, 588 S.W.2d 592 (Tex.Crim.App. 1978); Ex parte Green, 548 S.W.2d 914 (Tex. Crim.App. 1977); and Ex parte Powers, 487 S.W.2d 101 (Tex.Crim.App. 1972). In these cases, the Texas Court of Criminal Appeals held that a habeas corpus petitioner may not litigate the same matter simultaneously in state and federal court. The Court of Criminal Appeals in these cases has said that it will not "consider a petitioner's application so long as the federal courts retain jurisdiction of the same matter." Ex parte Green, 548 S.W.2d at 916. Obviously this rule of comity is a matter of state law. It has been presented to and rejected by the Texas Court of Criminal Appeals in this very case. Obviously it is for the state courts to expound and interpret state law. Brady v. Maryland, 373 U.S. 83, 90, 83 S.Ct. 1194 1198 (1963); Steele v. G. D. Searle & Co., 453 F.2d 339, 343 (5th Cir. 1973). Second, the rule by its own terms is inapplicable to Petitioner. No one has sought to litigate in two forums in this case except Petitioner himself. And as Petitioner recognizes, the setting of an execution date may be a mere ministerial act under Tex. Code Crim. Proc. Ann. art. 43.14. (Motion at 6).

Recently this court had occasion to examine in some detail the Texas habeas corpus abstention doctrine. Carter v. Estelle, 677 F.2d 427 (5th Cir. 1982). The Court concluded that the rule means simply that a petitioner may not challenge the same conviction in both state and federal courts simultaneously. Carter v. Estelle, 677 F.2d at 438. It has no application to these circumstances.

(b) Petitioner complains of the sixteen day delay between the time the Court of Criminal Appeals denied his second state habeas corpus application and the time he learned of that denial. It is difficult to grasp the relevance of this circumstance, even if true, to the present proceedings. Petitioner alleges that it has decreased the amount of time this Court can devote to his present motion. Although Respondent believes that the Court has adequate time to study and reject Petitioner's claims, the imminence of his execution is a circumstance that militates in favor, not against, the granting of his motion. O'Bryan v. Estelle, 691 F.2d 706, 708 (5th Cir. 1982).

(c) Petitioner presents the deposition of a witness at his trial, Mary Richards, who now apparently seeks to recant portions of her trial testimony. Petitioner deposed Richards on December 27, 1982. No issue pertaining to Richards was raised in the district court; accordingly, no such issue can be considered on appeal. Miller v. Turner, 658 F.2d 348, 350 (5th Cir. 1981); Page v. United States Parole Commission, 651 F.2d 1083, 1087 (5th Cir. 1981). Petitioner admits that this "issue is not now before this Court." (Motion at 26). Petitioner states that he has only recently learned of the matter, even though Richards stated in her deposition:

> "I have told absolutely everybody I know. Like I said, it's eating my stomach out for years and years and years ..."

(Ex. C at 27).

In any event, in its detailed exposition of the evidence at trial, the Texas Court of Criminal Appeals recited Richards's trial testimony as follows:

> "Mary Richards, who lived on Valley Road, heard the shot and looking through a window, she saw a man wearing a white T-shirt running down Valley Road from Amy Lane. Richards could not positively identify appellant, but testified he resembled the man she saw."

Barefoot v. State, 596 S.W.2d 875, 879 (Tex.Crim.App. 1980); (App. B).

Viewing Richards's depositional testimony most favorablly to Petitioner, she now states that her trial testimony was untrue in several respects. Some of these are minor and some are not so minor. She testifies that fear of reprisal from Petitioner's friends and the manner in which the prosecution prepared her for trial were responsible for the untrue aspects of her trial testimony.

Apparently Petitioner urges that his conviction should be set aside because the prosecution knowingly used perjured testimony. The knowing use of perjured testimony by the prosecution is ground for federal habeas corpus relief, provided that there is a reasonable likelihood that the judgment of the jury could have been affected by that testimony. United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392 (1976); Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763 (1972); Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173 (1959).

Respondent, after investigating the matter, categorically and unequivocally denies any prosecutorial misconduct whatsoever regarding this witness. Nevertheless, assuming arguendo the worst of Petitioner's implications, the issue would not present a basis for a stay of execution even if it were properly before the Court. The reason is that it is patently impossible to conclude that there is any reasonable likelihood that Richards's changed testimony could have affected the jury verdict of guilt. Richards could not identify Petitioner at trial. Petitioner told others that he was going to commit the precise crime for which he was convicted of committing and he boasted to others later that he had committed that very crime. He was positively identified by another witness nearer to the scene of the crime than Richards's ambiguous trial testimony placed him. He attempted to flee from Harker Heights to Houston. When he was apprehended, he bore the murder weapon in his back pocket. There is no reasonable possibility that Richards's testimony could have altered the jury verdict of guilt in light of the overwhelming inculpatory evidence presented by the state. There is no reasonable possibility that her testimony could have influenced the jury's punishment deliberations in the slightest. Accordingly, the matter must be rejected insofar as Petitioner urges it presents any basis for a stay of execution now.

(d) The sole issue properly in this appeal that Petitioner asserts is a basis for a stay of execution is the use of hypothetical questions posed to two psychiatrists at the punishment stage of his trial. Since neither psychiatrist examined Petitioner or even talked to him, Petitioner does not urge violation of Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866 (1981), in which the Supreme Court held that psychiatric testimony on the future dangerousness of a capital defendant violated the defendant's Sixth Amendment right to counsel when, after being indicted and having an attorney appointed, he was examined by the doctor on competency to stand trial and his statements were the basis for the doctor's testimony regarding the death penalty. Instead, he urges the inherent unreliability of such testimony deprived him of due process of law and rendered his punishment hearing fundamentally unfair.

In Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2950 (1976), the Supreme Court specifically upheld the predictive nature of the Texas capital punishment sentencing process:

> "[P]rediction of future criminal conduct is an essential element in many of the decisions rendered throughout our criminal justice system. The decision whether to admit a defendant to bail, for instance, must often turn on a judge's prediction of the defendant's future conduct. And any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose. For those sentenced to prison, those same predictions must be made by parole authorities. The task that a Texas jury must perform in answering the statutory question in issue is thus basically no different from the task performed countless times each day throughout the American system of criminal justice. (footnotes ommitted)."

Jurek v. Texas, 428 U.S. at 275-76, 96 S.Ct. at 2957-58.

In Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866 (1981), the Supreme Court specifically upheld the use of psychiatric testimony on the issue of future dangerousness as a matter that may be considered by the jury. The Court held that although psychiatric testimony is valuable in assisting the jury in its consideration of future dangerousness, the Texas procedures quite properly are not limited to expert psychiatric testimony, but are also amenable to testimony by lay persons.

> "While in no sense disapproving the use of psychiatric testimony bearing on the issue of future dangerousness, the holding in Jurek was guided by recognition that the inquiry mandated by Texas law does not require resort to medical experts."

Estelle v. Smith, 451 U.S. at 473, 101 S.Ct. at 1878.

Contrary to Petitioner's allegations, the use of hypothetical questions based upon the evidence at trial is an attempt to implement, not circumvent, the holdings in Jurek and Smith. The most basic hornbook endorses the use of hypothetical questions posed to experts. See, McCormick, Evidence, §14 at 33 (2d ed. 1972). The federal rules of evidence provide for such testimony. Rules 701-05, Federal Rules of Civil Procedure. Statements contained in the relevant literature are specifically excluded from the hearsay rule under Rule 803(18), Federal Rules of Civil Procedure. A valid objection to expert testimony will not lie upon the ground that the facts presented in the hypothetical question are not supported by the evidence. It is open to opposing counsel on cross-examination to change the facts of

the hypothetical question in whatever manner he deems appropriate. It is the province of the jury to evaluate these differing interpretations or, if there is no cross-examination upon the matter, to evaluate the weight of the expert's testimony in light of the defective aspects of the question.

Nor is it true that predictions of future dangerousness are inherently unreliable. Such predictions were endorsed by the Supreme Court in Jurek. Dr. Monahan's leading study in the field states as follows:

> "At several points in its gestation, The Clinical Prediction of Violent Behavior had a working subtitle. When I was begining the monograph, it was 'Why You Can't Do It.' About half way through writing it, I change the subtitle to 'How To Do It And Why You Shouldn't.' By the time I was finished, I was toying with 'How To Do It and When To Do It.' The development of my thinking on the prediction of violence is reflected quite well in these changes: from an empirical distaste for the task, to an ethical aversion to engaging in it, to a reluctant concession that there may be circumstances in which prediction is both empirically possible and ethically appropriate."

J. Monahan, The Clinical Prediction Of Violent Behavior at v (1981). Even the amicus curiae brief submitted by the American Psychiatric Association in Estelle v. Smith, heavily relied upon by Petitioner, argued that predictions of future dangerousness are of low reliability only where there is no clear pattern of past violent behavior:

> "In some circumstances, of course, a clinician might be fairly confident that violent behavior would recur, as for example, where a parent's past behavior clearly and repetitively evidences physical abuse of his or her children. But, as the Task Force noted, the relatively high degree of reliability in these cases is a function of knowing that the base rate of such behavior -- that is, the rate of repetitive past violent acts -- is very high for the person under scrutiny."

Amicus Curiae Brief of American Psychiatric Association at 13. The hypothetical questions posed in this case most certainly included assumptions of such past violent behavior.

At the evidentiary hearing in the district court, Petitioner presented two experts in his own behalf, Dr. Fred Fason, a psychiatrist, and Dr. Wendell Dickerson, a psychologist. Both testified that they would have given the same affirmative answer to the hypothetical questions that doctors Holbrook and Grigson gave at Petitioner's trial. They disagreed, however, with Holbrook's and Grigson's degree of certainty. Fason, as the district court noted, testified that he was only ninety percent sure that Petitioner was a severe anti-social psychopath who would commit future acts of violence dangerous to society, and Dickerson testified that he was somewhat less than ninety percent sure of the same conclusion. These differences are quantitative, not qualitative, and obviously go to the weight and not the admissibility of the testimony. As the district court concluded:

> "The Court is unaware of any theory upon which the writ of habeas corpus may be granted or Petitioner's death penalty invalidated simply because an expert testified that he was completely certain rather than almost completely certain of a particular conclusion."

(App. A at 12).

The district court also noted that Petitioner was not hampered in his cross-examination and that he was not precluded from presenting any evidence whatsoever at trial. The court

noted:

> "Indeed, it is a fundamental premise of our entire system of criminal jurisprudence that the purpose of the jury is to sort out the true testimony from the false, the important matters from the unimportant matters and, when called upon to do so, to give greater credence to one party's expert witnesses than another. Such matters occur routinely in the American judicial system, both civil and criminal. If the state's psychiatrists at trial erred in being overconfident as to their diagnosis of Petitioner, the Petitioner should have presented impeaching evidence or rebuttal testimony."

(App. A at 12-13). For these reasons, Petitioner's argument borders upon being frivolous. He relies upon the district court opinion in White v. Estelle, No. H-81-1661 (S.D.Tex., Dec. 30, 1982)(Ex. I). Whatever the merits of this opinion, its facts bear little resemblence to those in Petitioner's case. The doctors in White had examined the petitioner, in contravention of Smith v. Estelle. (Ex. I at 9-10). The district court found that they relied on their examination, at least in part, in reaching their conclusion. (Ex. I at 10). The jurors were aware that they had personally examined Petitioner. (Ex. I at 11). The district court also found that one doctor even specifically testified as to White's hedonism, a matter he knew from his examination. (Ex. I at 12).

The distinction between the holding in White v. Estelle and this case is painfully obvious.

(e) Petitioner also argues as a basis for his motion for stay that his trial attorneys were ineffective in failing to controvert the state's expert psychiatric testimony.

He admits that this issue is not properly before the Court because it was not raised in the court below. (Motion at 26). An evaluation of counsel's performance must, of course, be made in light of the totality of the quality of representation. Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708 (1980); Rummel v. Estelle, ___ F.2d ___ (5th Cir. 1980). In light of the district court's finding that Petitioner's allegation of ineffective assistance of counsel was frivolous (App. A at 5), as discussed below, the renewal of such a suggestion here is equally frivolous. The handling of expert witnesses is a difficult matter fraught with pitfalls and difficult strategic decisions, none of which can be the basis of a finding of ineffective assistance of counsel. Winfrey v. Maggio, ___ F.2d ____, No. 80-3048 (5th Cir., Dec. 28, 1981); Beckham v. Wainwright, 639 F.2d 262 (5th Cir. 1981); Ackridge v. Hopper, 545 F.2d 457 (5th Cir.), cert. denied, 431 U.S. 941, 97 S.Ct. 2657 (1977).

(D) Petitioner's Other Grounds In The District Court

Petitioner asserted other grounds for habeas relief in the district court that he does not urge in his present motion for stay of execution. A sensitive reading of the district court's opinion indeed indicates that the sole issue presented by Petitioner is indeed the least frivolous of those he presented below. Nevertheless, Respondent will apprise the Court of the other major three grounds.

(1) Petitioner argued that Tex. Code Crim. Proc. Ann. art. 37.071 is unconstitutional because it contains no provisions for directing the jury's consideration of mitigating circumstances. This claim was specifically rejected in Jurek v. Texas, 478 U.S. 262, 272-73, 96 S.Ct. 2950, 2956-57 (1976):

> "The Texas capital sentencing procedure guides and focuses the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender before it can impose a sentence of death."

The trial court's jury charge on punishment specifically informed them that they should consider all "of the evidence submitted to you in the full trial of the case," providing for the jury's consideration of both mitigating and aggravating circumstances." Petitioner's complaint as to the trial court's jury's charge is further without merit because no objection was made at trial upon this basis. Accordingly, under Engle v. Isaac, 456 U.S. ___, 102 S.Ct. 1584 (1982), and Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497 (1977), Petitioner has procedurally defaulted this ground.

(2) Petitioner urged that his appointed counsel, Gerald Brown and Stephen Blythe, were incompetent and did not understand Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770 (1968). The district court found this claim to be frivolous. (App. A at 5). Both attorneys testified at the evidentiary hearing in the district court. After consulting with a psychologist, they constructed a profile of the ideal juror from Petitioner's point of view. They carefully

consulted with Petitioner with reference to defense strategy as to each particular venireperson. Brown and Blythe had obtained their jury notes from trial and testified that they were able to explain why no objections were made to each venireperson who was excluded without objection. They were asked about several and gave detailed cogent explanations of their strategy in agreeing to the dismissal of each such juror. Petitioner received excellent representation at trial.

(3) Petitioner complained in the court below about the exclusion without objection of one such juror, Ruby Sanders. When Sanders would ask whether in all cases she would vote not to impose the death penalty, she responded as follows:

> "Yes, sir, that's right. I don't think that I can feel right even if I was on the jury and convicted an individual, I don't think that my conscience would allow me to continue to live on knowing that I am sentimental and believe in capital punishment or death or into this world."

Sanders was one of the jurors who Brown and Blythe testified they specifically did not want to be on their client's jury for strategic reasons. (App. A at 7). Accordingly, they did not object to her dismissal under Witherspoon. Moreover, under the Court's holding in Williams v. Maggio, 679 F.2d 381 (5th Cir. 1982)(en banc), she was plainly disqualified from jury service and was entitled to give an explanation of her categorical denial of ability to ever vote to impose the death penalty.

(4) Petitioner further complained of the trial court's treatment of forty-three other venirepersons. The district court's opinion discusses these venirepersons in detail. Here, too, Petitioner's counsel were able to explain their reasons for not objecting to the dismissal of most of these venirepersons. Five were properly excluded for cause. The district court properly found that Petitioner's complaint that eleven others were misinformed as to the law was entirely without merit. Petitioner was unable to specify any such miststatements.

CONCLUSION

For these reasons, Respondent respectfully prays that Petitioner's motion for stay of execution be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Douglas M. Becker, Assistant Attorney General of Texas, do hereby certify that on January 17, 1983, a true and correct copy of the above and foregoing Respondent's Response to Petitioner's Motion for Stay of Execution has been sent by Federal Express to:

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& Ms. Carolyn Garcia
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Douglas M. Becker

DOUGLAS M. BECKER
Assistant Attorney General

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CAUSE NUMBER 82-1680

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

****

THOMAS A. BAREFOOT,
Petitioner

VERSUS

W. J. ESTELLE, JR., DIRECTOR
TEXAS DEPARTMENT OF CORRECTIONS,
Respondent

****

MOTION FOR STAY OF EXECUTION

****

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CAUSE NO. 82-1680

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

THOMAS A. BAREFOOT,
Petitioner

versus

W. J. ESTELLE, JR., DIRECTOR
TEXAS DEPARTMENT OF CORRECTIONS,
Respondent

Motion for Stay of Execution

The petitioner, Thomas A. Barefoot, is scheduled to be executed by W. J. Estelle, Jr., Director, Texas Department of Corrections, before sunrise on January 25, 1983.

His appeal from the decision of the United States District Court for the Western District of Texas, Waco Division, Cause No. W-81-CA-191, was timely filed in this Court on December 7, 1982, after the Trial Judge issued a certificate of probable cause and granted petitioner leave to proceed in forma pauperis. On motion of the respondent, the trial court dissolved the stay of execution then in effect.

Even though the cause was then pending in this Court, the State trial judge issued a bench warrant for petition-

er's return to Belton, Bell County, Texas, where, on December 20, 1982, over petitioner's plea to the court's jurisdiction, he sentenced petitioner to be executed before sunrise on January 25, 1983. A copy of petitioner's plea to the jurisdiction is included in the Appendix as Exhibit "A".

As soon as the State trial proceedings were concluded, petitioner filed an application for writ of habeas corpus in the Court of Criminal Appeals of Texas, based upon that Court's uniform holdings that the Texas courts have no jurisdiction in habeas corpus proceedings that are pending in the Courts of the United States. A copy of the application and motion for stay of execution are included in the Appendix as Exhibit "B".

Even though the time for petitioner's execution was drawing near, his lawyers took no further action pending determination of the application and stay of execution by the Court of Criminal Appeals of Texas.

During the interim, on December 27, 1982, petitioner's lawyers deposed Mary Richards, one of the witnesses used by the State to place petitioner near the scene of the fatal shooting. Mrs. Richards admitted under oath that she had lied in her trial testimony with the knowledge of the Bell County District Attorney and his chief prosecutor. In addition, she informed the District Attorney, his chief prosecutor and chief investigator that she had heard three

shots. This testimony was suppressed because the State's case against petitioner was based upon the purported fact that only one shot had been fired, and that by petitioner. See Appendix, Exhibits "C", [the deposition] and "D", [her trial testimony].

On January 6, 1983, one of petitioner's lawyers telephoned the Honorable Tommy Lowe, Clerk of the Court of Criminal Appeals to check on the Court's delay in ruling on the application and motion for stay of execution, and was informed that the Court had not yet ruled on the matter.

The following morning, January 7, 1983, petitioner's lawyer telephoned the Honorable Marvin O. Teague, Judge on the Court of Criminal Appeals, on an unrelated matter. He was informed by Judge Teague that the Court had already denied the application and motion for stay of execution. Later that same day, a deputy clerk of the Court of Criminal Appeals telephoned Will Gray's office and informed his secretary that the Court had denied petitioner's application and motion for stay of execution on December 21, 1982, the day after it had been filed. Neither petitioner nor his lawyer was informed of the Court's action until January 7, 1983. Exhibit "E".

This sixteen day delay by the Court of Criminal Appeals in informing the petitioner of its summary ruling has caused petitioner irreparable damage and has prevented him from presenting a motion for a stay of execution to either

this Court or the United States District Court.

On January 10, 1983, the petitioner filed a Motion for Stay of Execution in the Court of Criminal Appeals of Texas, based upon the Court's unconscionable delay in advising petitioner that his application and motion for stay of execution had been denied and upon the newly-discovered evidence revealed by the Richards' deposition. [Exhibit "F"]

That motion was summarily denied by the Court on January 11, 1983.

The Court has thus squarely held that the Texas Courts are open to the prosecution and closed to a petitioner where an appeal from a petition for writ of habeas corpus is pending in the Courts of the United States.

This holding seems fundamentally unfair. It violates both due process and equal protection of the law. It is consistent, however, with the basic philosophy of the Texas Courts in dealing with capital murder cases.

The Court of Criminal Appeals of Texas has consistently held that an applicant may not seek habeas corpus relief in the State courts so long as the Federal courts retain jurisdiction over the same case. Ex parte Powers, 487 S.W. 2d 101 (Tex.Crim.App.1972). In Ex parte Green, 548 S.W.2d 914, 916 (Tex.Crim.App.1977), the Court said:

> "Further delay was caused by prosecuting an appeal to the Fifth Circuit from the federal court order at the same time Petitioner proceeded on his application for writ of habeas corpus in the courts of this State. A petitioner must decide

> which forum he will proceed in, because this Court will not, and a trial court in this State should not, consider a petitioner's application so long as the federal courts retain jurisdiction of the same matter." [emphasis added].

Again, in McNeil v. State, 588 S.W.2d 592 (Tex.Crim. App.1978) the Court wrote:

> "The petitioner now has pending in the United States District Court. . . an application for writ of habeas corpus seeking the same relief that he seeks here. Since that court has entertained and retained jurisdiction of the matter we dismiss this application. . . "

See, cf., Houston Chronicle Publishing Co., v. McMaster, 598 S.W.2d 864 (Tex.Crim.App.1980); United Services Life Insurance v. Delaney, 396 S.W.2d 855 (Tex.1965).

If an applicant is foreclosed from further recourse to the State courts where the federal courts have "entertained and retained jurisdiction" of the same matter, it follows that the State courts, consistent with basic concepts of due process and equal protection of the law, are likewise foreclosed from taking any action in the matter.

Because petitioner's broader-based petition for writ of habeas corpus is pending in this Court, the cases cited above bar further action by the State courts at this time. The trial court's action in ordering that petitioner be executed on January 25, 1983, is void or voidable if further State court action is precluded by Powers, Green, and McNeil. Unless this Court acts, he can be executed pursuant to that void or voidable order and warrant of execution. If the trial court's action is valid despite Powers, Green and McNeil, and the rule there articulated is applic-

able only to the petitioner's, it is fundamentally unfair. Petitioner's efforts to raise new grounds for relief based upon the Richards' deposition and the issues raised thereby in the State Courts while this case is still pending in the United States Court of Appeals were summarily denied by the Court of Criminal Appeals of Texas and his Motion for stay of execution was denied without written opinion, within the space of less than one day's consideration.

Amendment XIV, Section 1 of the Constitution of the United States provides that ". . . ; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

"That the action of state courts and of judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment, is a proposition which has long been established by decisions of [the Supreme] Court." Shelley v. Kraemer, 334 U.S. 1 (1948).

The Court of Criminal Appeals of Texas had chosen to disregard the provisions of the XIV Amendment. Even if it be conceded that the trial court's issuance of a death warrant in this case was a ministerial act, the trial court should have, under the decisions of the Court of Criminal Appeals of Texas, refrained from exercising it jurisdiction under the prevailing case law.

In the alternative, the Court of Criminal Appeals, having allowed the trial court to take such action at the behest of the prosecutor, should have stayed petitioner's scheduled execution, and should have ordered an evidentiary hearing of the issues raised by the Richards deposition.

THE STATE'S PSYCHIATRIC EVIDENCE AT THE PENALTY PHASE OF THE TRIAL

Doctor John Holbrook was "self employed", the major part of his practice being in the area of forensic psychiatry. His office was in Dallas, Texas. He listed an impressive array of qualifications. (R.2066-2069) He was employed by the Texas Department of Corrections from 1968 until 1973, primarily to "reinforce through a long correctional experience some of [his] experiences [he] had prior to that time in doing criminal evaluations." (R.2069)

According to Holbrook he had been called to testify as an expert witness for both the state and the defense in death penalty cases. (R.2070)

Holbrook thought it was within his capacity as a doctor of psychiatry to predict the future dangerousness of an individual within a reasonable medical certainty if he was supplied with enough background data about that individual. (R.2072) He could do this even if he had never seen the individual or never performed an actual face to face evaluation process with him. (R.2073)

Holbrook did not know petitioner. He had never talked

to him. Even so, he was prepared to answer and did answer the detailed factual question posed by the prosecutor: [Exhibit "H", R. 2074-2091].

HOLBROOK'S EXPERT PSYCHIATRIC OPINION

Holbrook, who later committed suicide, drew the following purported psychiatric conclusions from this jury argument framed as a hypothetical question: "Assuming all these data to be accurate, I think the first thing that becomes obvious from the data is that we have an individual who has established what is called a bad reputation as a law abiding, peace loving citizen. In something in the order of ten or twelve communities, plus or minus a few, in five states which is approximately a tenth of the whole continental area of the United States. He's been unable to establish any sort of normal kind of relationship to society but who has done just the contrary in that magnitude. Starting as far back as [1969] which -- we're moving up on ten years at this point. Over that period of time this kind of antisocial or lack of ability to adapt to society and not only that to more (R.2092) or less reject it. To not indicate in some way behaviorally at least, whether we know what's going on in his mind or not, that they're capable of relating to any of the normal institutions that most people live by. Either religion, science or political science, church, family or whatever. And none of these kind of loyalties seem to appear with that history. Further

then that we have in this history that is related to me an indication of an ascending sort of scale of criminal behavior in that the individual has been arrested a number of times for a variety of charges starting with relatively minor charges of possession of marijuana as I understand it, progressing to possession and even distribution of amphetamines, then moving to the element of adding danger to criminal behavior or possession of an illegal weapon and then a concealed weapon. There is a progression of this person actually having been confined and attempted to correct this kind of behavior at least on two occasions and indicate that that had no effect on this behavior. That it continued and accelerated throughout time. We see this person being very mobile, moving in the confines of five states <u>that we know about -- probably -- well, I won't say that.</u> At least five states that we know about and a number of communities <u>that we know about</u>. This person also has by history of this report contrived to do two things. To remain relatively anonymous by taking up an alias when it is convenient to do so. Further the individual has used that in such a way to serve their (sic) own purposes. Almost everything that is reported here indicates that not much behavior at least by history this person has done to serve purposes for anyone other than themselves (sic). So the indicators are this is extremely self-serving purpose -- person. He tends to disregard the normal values of social

life with this ascending scale maintaining anonymity and taking on an alias, to do that and maintaining considerable mobility. In the latter stages of the history the individual has continued to associate themselves (sic) with people who would perpetuate that anonymity and would even by some manipulation on their (sic) part provide them (sic) with transportation, food, lodging, without any real effort on that person's part. Assuming that all of the planning that went into this and the way it's stated, there are indicators that the individual really had in mind to commit a very serious offense and was intent upon doing it by history. This has been reported well in the book called "The Criminal Personality and Profile for Change" by Yokelman (phonetic) from Saint Elizabeth's Hospital in Washington, D.C. which is a net result of about eighteen years work of their separate life represents thirty-six years of their collective life. (R.2093-2095) They threw away about [300,000] pages of data given to them by individuals that they had evaluated there which is a criminal evaluation center and began to go upon basic data as this sort of thing, information given by family and the individual seemed to be worthless and a quarter million pages of it were thrown away after twelve years. The kind of information here shows what I have said thus far. The planning indicates what they found and what I have found over almost twenty years, that in the mind of the criminal whatever you

want to call it, they operate on the basis of three things -- four really. That they have a peculiar criminal mind. That each offense they commit has been thought of many times. The only thing they need is the opportunity together with a target and anonymity and mobility. They will invaribly provide those elements if they are very actively engaged in criminal thinking. This goes on and on. This is manifest in the history that you give. In the report of the individual actually sort of bragging about an offense of a very serious nature indicates that the person derived a great deal of personal pleasure. There certainly was no gain as far as I could determine from this data. This fits my own experience in dealing with the criminal (R. 2095), what ever you want to call them diagnostically. That the primary goal of the criminal is the excitement and the ego enhancing part of criminal behavior and when this begins to have an ascending kind of order both in frequency and in seriousness and involving more and more danger, that there is no end point other than the ultimate of danger to other people and/or themselves. So all of those elements are present. This is an invariable set of circumstances and it's born (sic) out by very good evidence and these people wrote three volumns on the subject and I made a contribution of my own. In reviewing the literature on the subject most authors who are thinking straight and you think now of Yokelman reviewed that and it's available - -."

At this point, petitioner's counsel finally interposed a hearsay objection which was sustained by the court, but Holbrook was undeterred: "Without belaboring that my opinion agrees with all of that." (R. 2096).

Holbrook's opinion was "based within a reasonable psychiatric certainty.

The late doctor next, within reasonable psychiatric certainty, classified petitioner as a "criminal sociopath.

According to Holbrook "the criminal sociopath involves criminal (R. 2097) behavior. The elements are normally by most authors including myself, suggest that the individual is number one, one who continues to demonstrate from early life into adulthood antisocial behavior and in the criminal its criminal antisocial behavior. These are acts that are not arrestable to arrestable kinds of behavior (sic)." (R. 2098)

Holbrook basically reiterated his first conclusionary statement, connecting the history given him with the actions of a "criminal sociopath." (R. 2098-2099) He found "probably six or seven major criterias (sic) for the sociopath in the criminal area within reasonable medical certainty. Most authors accept somewhere between five and fifteen. We might add another one here and that is usually in the history of this individual you will find some indicator of violence or serious threats of violence which, if taken alone, may not be significant but if taken in this

history and the context of this person's life, one might begin to take it very seriously. Another thing that might be mentioned here is another criteria and I think we're up to around seven or eight now, would be, the person escaping or running away from authority or being unwilling to accept a confrontation in the legal way in a court of law. The run away or escape is usually a part of the history. Truancy very often when they are young or it may, in fact, be present in the correctional sense or the legal sense where a fugitive or a person who had become a fugitive and run away from (R. 2099) even that basic responsibility. In summary those are the characteristics of the criminal sociopath in my view and many, many other people." (R. 2100).

Holbrook knew of no treatment that could be given a person such as petitioner that would make him change his personality and behavior from that of being a criminal sociopath. (R. 2100) In his opinion, petitioner's personality and behavior may become accelerated within the next few years, that is what he would anticipate. It was his further opinion that within reasoable psychiatric certainty there was a probability that petitioner would commit criminal acts of violence in the future that would constitute a continuing threat to society, and this would include the society within the Texas Department of Corrections. (R. 2100-2101).

On cross-examination Holbrook conceded that (1) he never examined Barefoot; (2) he never had Barfeoot under any kind of clinical study and never observed him before he came into the courtroom that day; and (3) he had not been present during the course of the trial. (R. 2101-2102)

GRIGSON'S EXPERT PSYCHIATRIC OPINION

Doctor James Grigson who, along with Holbrook, has testified for the State in an inordinate number of capital murder cases in Texas, (see Smith v. Estelle, 602 F.2d 694, 699-701, fn. 7) was asked essentially the same hypothetical question. (R. 2111-2126). The second hypothetical question contained additional details about the offenses for which petitioner was arrested in New Mexico before the date of the present offense.

Grigson after reviewing his credentials, asserted that, even without a medical or psychiatric examination of an individual, he would be able to give a medical opinion within reasonable psychiatric certainty as to the psychological or psychiatric makeup of an individual, provided he was given sufficient facts, information and circumstances. (R. 2110).

After hearing the question, Grigson said: "This would be a fairly classical, typical, sociopathic personality disorder. (R. 2128). According to Grigson the most outstanding characteristic of the sociopath is the lack of a conscience. There are varying degrees of this disorder. On a scale of one to ten there is the mild sociopath, all

the way up to the severe sociopath who have a complete disregard for another person's life. Based on the facts given him, Grigson placed Barefoot "into your most severe category. If you go up above ten, it would be above ten but really in your most severe sociopaths. . ."There is not anything in medicine or psychiatry or any other field that will any way at all modify or change the severe sociopath. There is just not anything available." (R. 2128-2129)

Grigson was then asked: "Assuming as true the facts of the hypothetical question. . . do you have an opinion within reasonable psychiatric certainty whether or not there is a probability that the defendant, Thomas Andrew Barefoot, will commit criminal acts of violence that would constitute a continuing threat to society?"

Not surprisingly, Grigson did have an opinion: "Yes, he most certainly would." This would be true, no matter where petitioner was. "It wouldn't matter whether he was in the penitentiary or whether he was free. Wherever he is he's going to continue what he's already been doing." Not satisfied with this outrageous conclusion, the prosecutor persisted: "Would you state whether or not, Doctor Grigson, you have an opinion within reasonable psychiatric certainty as to the degree of that probability that you have just expressed to this jury?"

Grigson: "Well, yes, sir, I would put it at one hundred percent and absolute."

On cross-examination Grigson denied that he was familiar with the following: (1) American Psychiatric Association Task Force Report on Clinical Aspects of the Violent Individual; (2) Dr. Bernard Diamond's article on the Psychiatric Prediction of Dangerousness; (3) Cocozza and Stedman's article on the failure of psychiatric predictions of dangerousness published in 1976; (4) Doctor Guttmacher's Clinical Evaluation of the Dangerousness of the Mentally Ill; (5) Doctor Rubin's article on The Prediction of Dangerousness in Mentally Ill Criminals. (R. 2133-2134).

Grigson said it was untrue that it was the position of the American Psychiatric Association that psychiatrists cannot reliably predict whether or not someone -- criminals in the future are going to commit future acts of violence. According to Grigson "This is that same group that found homosexuality was not an illness and this is a small minority group."(R. 2134)

PETITIONER"S OBJECTIONS TO THE PSYCHIATRIC TESTIMONY

Petitioner objected to the hypothetical question posed to Holbrook because it assumed only aggravating facts and assumed no mitigating facts that were brought out during the trial; that is assumed facts that were controverted by the evidence; that in some cases it assumes what was going on in the mind of persons involved "which facts are not facts in evidence at all;" and because "there is no way that a hypothetical can be generated which will incorporate all

the facts which have come before [the] jury and which would incorporate what [the] jury has determined to be true . . . [or] untrue." (R. 2091)

A similar objection was interposed when Grigson testified, with the additional statement that the question was asking the witness to invade the province of the jury. (R. 2126-2127)

Petitioner had earlier outside the presence of the jury, made similar objections to Grigson's testimony. (R. 2042-2044).

The Court of Criminal Appeals of Texas, with no voice raised in dissent, asserted that the use of expert testimony and the testimony of experts based upon hypothetical questions, is a matter of state law and, under the peculiar Texas statutes, within the exclusive discretion of each individual trial judge, who may admit any evidence he deems relevant to sentence.

Such claim must yield to the Constitutional requirement ment for reliability in the determination that death is the proper punishment after conviction of a capital offense.

The global purview of the Texas punishment issue predicated upon a finding of future dangerousness, requires exclusion of psychiatric predictions of future dangerousness as a matter of federal constitutional law.

Second, even if even if psychiatric predictions of future dangerousness based upon a <u>legitimate</u> psychiatric and

medical examination be proper at the punishment stage of a capital trial, where these predictions are based, as here, solely upon a hypothetical resume of the same evidence heard by the jury, embellished with the prosecutor's conclusions, and are submitted to the jury with no medical or psychiatric evidence requiring expert analysis for the assistance of the jury in resolving the issue of future dangerousness, the punishment proceeding is distorted, the accused is denied a fair hearing by the fact finders, and the state is permitted to bolster its non-medical and non-psychiatric "evidence" with the gloss of medical expertise.

See White v. Estelle, CA No. H-81-1661, decided on December 30, 1982, where Judge Singleton wrote, pp 16-17, setting aside a death sentence. [Exhibit "H"]:

> "This court has serious reservations about the use of psychiatric predictions based on hypotheticals and doubts their validity when the doctor has had no previous contact with the defendant. The prevailing view among psychiatrists and professional psychiatric associations, a view to which this court subscribes, is that to the extent that long-range dangerousness can be predicted (a view not accepted by the psychiatric community), (footnote omitted) an opinion as to an individual's future penchant for violence which does not follow extensive examination and is not based on a great deal of comples and in-depth information, is not a professional, but a lay opinion. (footnote omitted). However, when this lay opinion is proferred (sic) by a witness bearing the title of 'Doctor,' its impact on the jury is much greater than if it were not masquerading as something it is not."

Third, Grigson's flat prophecy that Barefoot "most

certainly would" commit future criminal acts of violence that would constitute a continuing threat to society, and that the probability of such future conduct was "one hundred percent and absolute," within reasonable psychiatric certainty, was outright quackery and its chicanery went to the very heart of the discretionary sentencing process required by the Eight and Fourteenth Amendments to the Constitution of the United States.

The evil of such predictions, at least by practitioners like Grigson and Holbrook, under the Texas capital punishment statutes, is that they eliminate the jury's need to consider mitigating evidence. There is no cure, according to these experts, for the criminal sociopath. He cannot even be confined in the Texas Department of Correction for a term of life imprisonment lest he harm the "society" therein. Thus the following assurances made by the Court of Criminal Appeals of Texas, in Jurek v. State, 522 S.W.2d 934, 939-940, (Tex.Crim.App.1975), cited with approval in Jurek v. Texas, 428 U.S. 262, at 272-273 (1976), are meaningless;

> "In determining the likelihood that the defendant would be a continuing threat to society, the jury could consider whether the defendant had a significant criminal record. It could consider the range and severity of his prior criminal conduct. It could further look to the age of the defendant and whether or not at the time of the commission of the offense he was acting under duress or under the domination of another. It could also consider

> whether the defendant was under an extreme form of mental or emotional pressure, something less, perhaps, than insanity, but more than the emotions of the average man, however inflamed, could withstand."

There is likewise no room in the "criminal sociopath category for consideration of the youth of the offender, the fact that he was under the influence of drugs, alcohol, or extreme emotional disturbance, and even the existence of circumstances which the offender reasonably believed provided a moral justification for his conduct. Roberts v. Louisiana, 431 U.S. 633, 637 (1977).

Equally immaterial is the fact that the offender was a party to but did not himself commit the murder. Lockett v. Ohio, 438 U.S. 586 (1978)

All of these mitigating circumstances are moot under the Grigson-Holbrook caveat that there is no known cure for the sociopathic personality. What matters the age of the offender, his part in the crime, whether he was acting under duress or was under the domination of another, whether he was under an extreme form of mental or emotional pressure, the fact that he was under the influence of drugs or alcohol, or the fact that he reasonably believed in the existence of circumstances which provided a moral justification for his conduct? Even if all these factors be true, if he is a sociopath, he must die.

The Grigson-Holbrook prophecies carefully eliminate the jury's need to consider life imprisonment for the offender. He will be a danger to the inmates and personnel of the Texas Department of Corrections. This all adds up

to a mandatory affirmative answer to the second punishment issue and a mandatory sentence of death for the offender.

It can thus be seen that the reliability of such opinions goes to the very heart of the punishment proceedings in Texas capital murder trials.

A majority of the Supreme Court swept aside a state procedural rule which excluded relevant and reliable mitigating evidence at the punishment proceeding, holding that such exclusion constituted a violation of the Due Process Clause of the Fourteenth Amendment. Green v. Georgia, 442 U.S. 95 (1979). The harm is just as great to a convicted capital offender where the state procedural rule or statute permits the admission of bolstering and potentially unreliable aggravating evidence at the punishment proceedings. Cf. Gardner v. Florida, 430 U.S. 349 (1977).

In Gardner, three Members of the Court agreed that the sentencing process of a capital trial must satisfy the requirements of the Due Process Clause and that sentencing is a critical stage of a capital proceeding at at which the defendant is entitled to the effective assistance of counsel.

As Mr. Justice Stevens noted in Gardner:

> ". . . [F]ive Members of the Court have now expressly recognized that death is a different kind of punishment from any other which may be imposed in this country."
> and:
> "It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to

be, based on reason rather than caprice or emotion." 430 U.S. at 357-358.

Both psychiatrists in petitioner's case reached their standard boilerplate psudo-psychiatric conclusions upon non-medical and non-psychiatric facts. A person's reputation for being a peaceful and law abiding citizen in various communities appears to have little or no medical or psychiatric significance. It may be a social commentary upon those who testify about such "reputation," however. Doubtless the late Doctor Martin Luther King had such a reputation over a wider georgaphic range than did petitioner in the same circles that established petitioner's reputation. It is interesting to note how quickly Holbrook became a legal advocate when he analyzed this evidence, noting that petitioner had a bad reputation as a peaceful and law abiding citizen in "ten or twelve communities, plus or minus a few, in five state which is approximately a tenth of the whole continental area of the United States." Later Holbrook expanded on this geographic opinion by saying that petitioner was very mobile, moving in the confines of five states "that we know about" and a "number of communities that we know about." He also found significance in the fact that petitioner had used an alias in Bell County, after his escape from the New Mexico jail. This showed that petitioner tended to disregard the normal values of social life with this ascending scale maintaining anonymity and taking on an alias while at the same time maintaining

considerable mobility [and becoming so well known that his reputation was common knowledge over vast areas of the United States.

Grigson made no effort to correlate petitioner's "history" as recounted by the prosecutor with his standard conclusions, or to base his standard conclusions upon any expertise involving the fields of medicine, psychiatry or psychology.

Substantive due process of law at the penalty stage of a capital murder trial, requires the rejection of such testimony. "Jury errors in assessing the credibility of this type of evidence create a significant risk of inaccurate imposition of the death sentence, and of the perversion of the entire discretionary sentrencing process mandated by the eighth and fourteenth amendments." Dix, Expert Prediction Testimony in Capital Sentencing, 19 Am.Crim.L.Rev., 1-48, at 48 (1981).

See "Draft Report of the Task Force on the Role of Psychiatry in the Sentencing Process", recently prepared and adopted by the American Psychiatric Association. Exhibit "G". There the Task Force noted, pp., 30-31:

"If results of examinations conducted for other purposes are to be excluded from introduction at sentencing hearings because of a concern with their accuracy for the purpose at hand, there is all the more reason to shun the practice of testifying without having examined the defendant at all. A recent court decision in Texas, where this practice apparently has been common, concluded that a psychiatric opinion concerning a defendant's dangerousness formed without a personal

examination of the defendant, but on the basis of police reports, conversations with third persons, and other information of unestablished reliability, was not admissible evidence. (29) The Task Force agrees that, as a matter of professional ethics, a conclusion based on such data is insufficiently grounded to be offered as an expert opinion on any issue in a criminal case, including those which arise at sentencing.

A variation of this practice is for the psychiatrist to be asked to respond to "hypothetical" questions at a sentencing hearing. The prosecutor using this technique might detail athe defendant's history and then ask the psychiatrist to comment on a "hypothetical" person who displayed these traits. Often here, too, danagerousness is the focus of the assessment. Needless to say, responding to hypotheticals is just as fraught with the possibility of error as testibying in any other way about an individual whom one has not personally examined."

The American Psychiatric Association has informed petitioner that it intends to file a motion to file a brief amicus curiae in this cause on the issue of the reliability of psychiatric testimony concerning long-range probable future dangerousness when such testimony is based solely on hypothetical questions. Exhibit "H".

See the opinion of the United States District Court for the Southern District of Texas, Houston Division, Cause No. CA-H-81-1661, decided by Judge Singleton on December 30, 1982. White v. Estelle. Exhibit "I".

The conclusions by the Court below fail to address this issue. The use of such "expert" testimony by the State should be examined in depth by this Court. White addressed a slightly different version of the present issue, involving the use

of "hypothetical" questions to elicit expert opinions from psychiatrists who had examined the defendant for the sole purposes of determining his present sanity and his competency to stand trial, and is thus partially based upon Estelle v. Smith, 451 U.S. 454 (1981).

The difference between White and this cause is one of form rather than substance, at least insofar as basic Eighth Amendment rights, and due process of law and effective assistance of counsel are concerned. Judge Singleton's recognition of the inherent damage to a fair penalty hearing by the State's use of "hypothetical" questions addressed to "expert" witnesses could therefore be grounded upon both Sixth and Fourteenth Amendment rights. See Gardner v. Florida, 430 U.S. 349 (1977).

For all of the above reasons, this Court should grant a stay of petitioner's execution, scheduled before sunrise on January 25, 1983.

Both this case and White v. Estelle, could then be jointly submitted for this Court's resolution of two aspects of expert opinions based either wholly or in part upon "hypothetical" questions as used in Texas at the penalty stage of capital murder trials.

The trial testimony of both Holbrook and Grigson is appended to his motion for stay of execution as Exhibits "J" and "K".

An additional reason for the Court to grant a stay of petitioner's execution is the newly-discovered evidence raised by the Richards' deposition, even though that issue is not now before this Court, having been placed in limbo by the Court of Criminal Appeals of Texas.

Evidence that the prosecutors in a capital murder trial knowingly used perjured testimony cannot be harmless error in view of the life or death issue involved. This evidence was not available to the petitioner until the State trial judge set a new execution date on December 20, 1982. Neither this Court nor any other court should speculate upon the effect that Mary Richards' untruthful testimony, and her suppressed testimony that she heard three shots instead of one, might have had on the jury.

Finally, the conclusions of the Federal District Judge that petitioner's counsel could have presented testimony refuting the Grigson-Holbrook testimony, and failed to do so, raises an issue of ineffective assistance counsel in that context, another issue not now before this Court.

CONCLUSION AND PRAYER

The issues detailed above were wrongly decided by the Court below. The integrity of the sentencing process in Texas capital murder trials is jeopardized by the psychiatric procedures utilized by the State to circumvent Estelle v.

Smith, supra, and here involves the same two "experts" used by the State in Smith. Their conclusions are identical to those given by them in the numerous cases cited by this Court in Smith v. Estelle, supra, whether they examined the defendant or not.

The closely related issues decided by Judge Singleton in White v. Estelle, supra, conflict with the holding of the District Court in petitioner's case. That conflict should be resolved by this Court.

The conclusion by the court below, that defense counsel could have introduced evidence to refute the Grigson-Holbrook testimony, raises a serious issue of ineffective assistance of counsel.

Finally, the newly-discovered evidence from Mary Richards, involving the State's knowing use of perjured testimony and its suppression of other evidence available from this witness, are additional reasons for this Court to stay the petitioner's execution.

The petitioner, Thomas A. Barefoot, prays that the Court enter an Order staying his execution by W. J. Estelle, Jr., Director, Texas Department of Corrections, scheduled before sunrise on January 25, 1983, pending this Court's disposition of his appeal from the judgment of the court below.

Respectfully submitted

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Petitioner's lawyers

CERTIFICATION

I certify that I mailed a copy of this Motion for Stay of Execution to Douglas A. Becker, Assistant Attorney General of Texas, Supreme Court Building, P.O. Box 12548, Austin, Texas, 78711, by certified mail, postage prepaid, on January 13, 1983.

Will Gray

NO. 26,812

THE STATE OF TEXAS	IN THE 27TH DISTRICT COURT
VS.	OF
THOMAS A. BAREFOOT	BELL COUNTY, TEXAS

PLEA TO THE JURISDICTION

The defendant, Thomas A. Barefoot, files his plea to this Court's jurisdiction to take any action whatsoever in this cause.

Jurisdiction in this cause, entitled Thomas Barefoot vs. W. J. Estelle, Jr., Director, Texas Department of Corrections, Civil Action No. W-81-CA-191, remains in the Courts of the United States and the cause has been docketed for appeal in the United States Court of Appeals for the Fifth Circuit. See the Certificate issued by the Federal District Judge on December 10, 1982, pursuant to Rules 22(b) and 24(a), F.R.A.P., and Fifth Circuit Local Rule 8.3, in which the Court determined that there is probable cause for an appeal, that Barefoot is a pauper, and his appeal is taken in good faith.

In addition to the above, this Court has chosen to ignore the holdings of the Court of Criminal Appeals of Texas in Ex parte Powers, 487 S.W.2d 101 (Tex.Crim.App.1972); Ex parte Green, 548 S.W.2d 914 (Tex.Crim.App.1977); and McNeil v. State, 588 S.W.2d 592 (Tex.Crim.App.1978); and cf., Houston Chronicle Publishing Co., v. McMaster, 598 S.W.2d 864 (Tex.Crim.App.1980); United Services Life Insurance Co., v. Delaney, 396 S.W.2d 855 (Tex.Sup.Ct.1965).

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EXHIBIT "A"

The trial court's attempted assumption of jurisdiction while the case is still pending in the federal courts is void and violates the Constitutions of Texas and the United States. This arbitrary and unconstitutional action, taken by the court for whatever reason, places an added burden on the taxpayers, on the state and federal judicial systems and on defense counsel who are compelled to respond to such unwarranted proceedings.

Based upon the cited cases and the Constitutions of Texas and of the United States, the defendant, Thomas A. Barefoot, objects to the jurisdiction of this court to take any action whatsoever in this cause at the present time.

Respectfully submitted

Will Gray
TBA No. 08339000
Defendant's lawyer
2038 Lexington Street
Houston, Texas 77098

CERTIFICATION

I delivered a copy of this Motion to the District Attorney of Bell County, Texas, on December 20, 1982.

Will Gray

EXHIBIT "A"

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CAUSE NO. _____

IN THE
COURT OF CRIMINAL APPEALS OF TEXAS
AUSTIN, TEXAS

EX PARTE
THOMAS A. BAREFOOT

ORIGINAL APPLICATION FOR WRIT OF HABEAS CORPUS

The applicant, Thomas A. Barefoot, files his original application for a writ of habeas corpus.

Barefoot was convicted of capital murder and sentenced to death on November 21, 1978, Cause No. 26,812, in the 27th Judicial District Court of Bell County, Texas. The conviction and sentence were affirmed by this Court on March 12, 1980. Barefoot v. State, 596 S.W. 2d 875. The Supreme Court of the United States denied certiorari on June 29, 1981. Barefoot v. Texas, 453 U.S. 913 (1981).

On August 14, 1981, the 27th Judicial District Court of Bell County, Texas, ordered that Barefoot be executed before sunrise on October 13, 1981. Barefoot's application for writ of habeas corpus was denied by the 27th Judicial District Court of Bell County, Texas, without hearing on October 6, 1981, and this Court denied Barefoot's motion for stay of execution and application for writ of habeas corpus on October 7, 1981.

On October 9, 1981, the United States District Court granted a stay of execution pending consideration of the petition for writ of habeas corpus.

Following an evidentiary hearing, conducted on July 28, 1982, after which the federal District Judge denied the petition for writ of habeas corpus and dissolved the stay of execution. He did, however, certify that there was probable cause for an appeal, Rule 22(b)

Exhibit "B"

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F.R.A.P., and that the petitioner was a pauper and the appeal was taken in good faith. [Exhibit "A"]. The appeal is being perfected to the United States Court of Appeals for the Fifth Circuit, and sole jurisdiction of this matter has vested in the Courts of the United States.

Even though the judge of the 27th Judicial District Court of Bell County was fully aware of the federal proceedings, he issued a bench warrant and had Barefoot returned to the Bell County jail, where, on December 20, 1982, over Barefoot's objection that the State Court had no jurisdiction to take such action, he was sentenced to be executed before sunrise on January 25, 1983.

The action of the trial court in this cause is a far cry from that apparently approved by this Court in O'Bryan v. Estelle, where the petitioner there had merely filed a petition for writ of habeas corpus in the United States District Court the day before the State trial court set an execution date.

This Court has long held that an applicant may not seek habeas corpus relief in the State courts so long as the Federal courts retain jurisdiction over the same case. Ex parte Powers, 487 S.W. 2d 101 (Tex.Crim.App.1972). In Ex parte Green, 548 S.W.2d 914, 916 (Tex.Crim.App.1977), the Court said:

> "Further delay was caused by prosecuting an appeal to the Fifth Circuit from the federal court order at the same time Petitioner proceeded on his application for writ of habeas corpus in the courts of this State. A petitioner must decide which forum he will proceed in, because this Court will not, and a trial court in this State should not, consider a petitioner's application so long as the federal courts retain jurisdiction of the same matter."

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Again, in McNeil v. State, 588 S.W.2d 592 (Tex.Crim.App.1978) Court wrote:

> "The petitioner now has pending in the United States District Court. . .an application for writ of habeas corpus seeking the same relief that he seeks here. Since that court has entertained and retained jurisdiction of the matter we dismiss this application. . ."

See, cf., Houston Chronicle Publishing Co., v. McMaster, 598 S.W.2d 864 (Tex.Crim.App.1980); United Services Life Insurance Co., v. Delaney, 396 S.W.2d 855 (Tex.1965).

If an applicant is foreclosed from further recourse to the State courts where the federal courts have "entertained and retained jurisdiction" of the same matter, it follows that the State courts, consistent with basic concepts of due process and equal protection of the law, are likewise foreclosed from taking any action in the matter.

Even though Barefoot's broader-based petition for writ of habeas corpus is pending in the United States Court of Appeals, the cases cited above cannot bar the relief here sought. The issue is quite simple. The trial court's action in ordering that Barefoot be executed on January , 1983, is void or voidable if further State court action is precluded by Powers, Green, and McNeil. Unless this Court acts, he can be executed pursuant to that void or voidable order and warrant of execution. If the trial court's action is valid despite Powers, Green and McNeil, and the rule there articulated is applicable only to the petitioner's, it is fundamentally unfair. Had Barefoot sought to raise new grounds for relief in the State Courts while this case is still pending in the United States Court of Appeals, both the trial court and this Court would have refused to consider his application.

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The applicant, Thomas A. Barefoot, prays that this Court grant his application for writ of habeas corpus and set aside the invalid warrant of execution and order of the 27th Judicial District Court of Bell County, Texas, entered in Cause No. 26,812 on December 20, 1982, and that the scheduled date of his execution, January 25, 1983, be vacated.

Respectfully submitted

Will Gray

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Applicant's lawyer
2038 Lexington Street
Houston, Texas 77098
(713) 759-0585

CERTIFICATION

I delivered a copy of this Application for Writ of Habeas Corpus to the District Attorney of Bell County, Texas, and to the State's Attorney, Supreme Court Building, Austin, Texas, on December 20, 1982.

Will Gray

Will Gray

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
W A C O DIVISION

FILED
DEC 14 1982
CHARLES W. VACHER, Clerk
By Deputy

THOMAS HAMMOCK

VS

W. J. ESTELLE, JR.

CIVIL ACTION NO. W-81-CA-191

C E R T I F I C A T E
(Rules 22(b) and 24(a), FRAP)

Came on this date for consideration the Notice of Appeal and/or Motion for Leave to Appeal in Forma Pauperis heretofore filed in the above styled and numbered matter; to-wit, a habeas corpus case in which the detention complained of arises out of process issued by a state court. Considering the record of this case and in accordance with the provisions of Rule 22(b), FRAP, the Court

HEREBY CERTIFIES THAT THERE IS PROBABLE CAUSE FOR AN APPEAL.

It further appears to this Court that, in accordance with the provisions of Rule 24(a), FRAP, and Fifth Circuit Local Court Rule 8.3,

THE PETITIONER IS A PAUPER AND THE APPEAL IS TAKEN IN GOOD FAITH.

DONE, this the 10th day of December, 19 82,

at Midland, Texas.

Lucius D. Bunton
United States District Judge

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EXHIBIT "C"

NO. 25,312

STATE OF TEXAS	)	IN THE 27th JUDICIAL
	)	
VS.	)	DISTRICT COURT OF
	)	
THOMAS A. BARFOOT, a/k/a DARREN CALLIER	)	BELL COUNTY, TEXAS

* *

ORAL DEPOSITION OF MARY RICHARDS

* *

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ANSWERS AND DEPOSITION OF MARY RICHARDS, a witness called by the Defendant, taken before William A. Bobo, Jr., Certified Shorthand Reporter and Notary Public in Travis County for the State of Texas, on the 27th day of December, A.D. 1982, between the hours of 2:30 o'clock p.m. and 3:00 o'clock p.m., in the law offices of John Parker, 1013 N. 9th Street, Austin, Texas.

APPEARANCES

For the Defendant: NILL GRAY
P.O. Box 613
Simonton, Texas 77476

-and-

CAROLYN CLAISE GARCIA
2038 Lexington Street
Houston, Texas 77093

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MARY RICHARDS

was called as a witness and, having been previously duly sworn, testified as follows:

DIRECT EXAMINATION

QUESTIONS BY MR. GRAY:

Q. Tell us your name, please, ma'am.

A. Mary Richards.

Q. And where do you live?

A. At 122 Arlo, Barker Heights.

(At this time there was a brief interruption in the deposition, after which time the deposition continued as follows:)

QUESTIONS BY MR. GRAY:

Q. Okay. And how long have you lived at that address, ma'am?

A. Oh, gosh, I think it's going on three years.

Q. And, before that, where did you live?

A. Valley Road, and I can't remember the address -- one eleven? Yeah, one eleven Valley Road.

Q. Okay. And were you living there back in 1973?

A. Yes, I was.

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Q. Where do you work now at the present time?

A. At the main commissary in Fort Hood.

Q. Back in 1973, where were you working?

A. At the Oasis Club in the office.

Q. Is that in Harker Heights or in Killeen?

A. It's in Harker Heights, Business 190, and the office was in back of the Oasis Club.

Q. Were you living there on August 25th, 1973?

A. Yes, I was.

Q. I mean working there?

A. Yes.

Q. Okay. Well, that's still not the right date.

MS. GARCIA: Here.

QUESTIONS BY MR. GRAY:

Q. Okay. And you were also living there on August 7th, 1973; is that right?

A. Right.

Q. Did anything unusual occur in the early morning hours of August 7th, 1973?

A. Yes. I couldn't sleep that night and I was laying in bed and I heard what had

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sounded like a shot. The police in Harker Heights used to target shoot at the City dump and the same sound was there, but it was a louder sound. And within seconds, I heard another one that sounded like a shot. I got up and then I heard a third one ring out.

I looked out the window -- I had my bedroom window open, I looked out the window, I had my head pressed against the screen and I heard a dog barking on the hill. And, as the dog was barking, I kept looking down the street in case it was shots that I heard.

So, all of a sudden, a man come running down the street and the man was wearing gray pants, a white T-shirt, he was big built, had dark hair, auburn cast, he had thick dark hair and it was like it was just freshly styled, combed back, shorter in the back but a little wavy. He looked either Indian or Hawaiian, very, very smooth skin.

And, being as there was shots and everything that it sounded like, I just wanted to get a good description in case it was shots that I heard. So I furthered to look into his pants -- into his pants pocket to see

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if there was any bulges or anything. Now it was a peculiar way he was running. When he was running, it wasn't a fast running, it was a very slow jog run. He had both fists closed running side by side in front of him and bent at the elbows.

I looked in his pocket, in case it was gunshots I heard, for a bulge in his pockets and there were no bulges on the right front pocket or in the two back pockets. His legs were very muscular, his arms very muscular, his chest very muscular.

Q. Did he have any weapon in his hands?

A. He had no weapon in his hands and no bulges in the pockets and I almost said "hey" for him to turn face forward and the only thing that I got was the side description, which he had very smooth baby skin, eyebrows going down, just baby-smooth skin --

Q. Did he --

A. -- and so I thought -- I'm sorry, did he what?

Q. Did he have a mustache?

A. No, absolutely not. It was very smooth skin.

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Q. And how tall did you say -- did he appear to be?

A. I would say anywhere between six foot to six three --

Q. What are you basing this on?

A. -- and he was built like a boxer. My ex-husband was six one, so heightwise, I was looking at that height.

Q. He was about the same height as your ex-husband?

A. About the same, yes.

Q. Athletic-type build?

A. He looked boxer like he -- he either works out all the time or boxes or something because, from the head to the toe, it was solid muscle.

Q. Uh-huh. Did he have long straggly hair or --

A. No, he had short styled hair combed back to the sides just to the ear lobe and, in the back, it was about ear lobe length, but cut rounded. I was a hair dresser, so as for description of hair, I knew it very well. It was very thick and coarse looking, but very neat in appearance.

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Q. All right. And what time of the morning did this occur?

A. I don't remember.

Q. Was it light outside?

A. It was -- no, it was still dark outside.

Q. Is there a street light located directly outside your window?

A. Yes, there is a street light; this is what made me get such a good description of him. The street is very close and my window is right directly under the street light.

If I saw anybody running under there, I would know who they were because it's so close and I could see just absolutely everything of the man from a side view.

Q. All right. And how long was he in your view before --

A. Okay. He was in my view from -- oh, gosh, I would say at least 40 to 50 seconds, a minute.

Q. All right. And then where did he go?

A. Okay. There was a creek across the way and I thought, well, if it was shots that I heard, maybe he'll run down into the creek and,

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instead of him running into the creek, he kept going straight on down the street, so, like an idiot, I went out on the porch. I opened up the door and there was a tree overlaying from the other side of my house in the neighbor's yard. It was overlaying the street and I couldn't see any more distance of where the man went.

Q. Did you hear anything after that?

A. Within seconds -- well, first off, I looked up and I couldn't see anybody and I looked around the neighborhood to see if there were lights on, if -- anything, and I didn't see anything, but then I walked back into the house, went to the bedroom and I started hearing dogs barking up the street behind me.

Q. What's the name of that street; do you remember?

A. No, I don't remember it. I don't remember the name of it.

Q. Okay.

A. But right after that, then I laid down in my bed and I heard a car come speeding up the road from where the man had just run from and I heard the car come speeding up the road, I looked out the window -- which my bed is right

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next to the window -- looked out the window and there was a black and white police car, which was the highway patrolman -- speeded up to where the man had just come from.

Q. Now that road at the top of the hill, is that Any Lane?

A. It's Any Lane, yes.

Q. A-n-y Lane?

A. Right.

Q. And that's where the man was running from and that's where the police car later came from?

A. Exactly.

Q. Now the next day, did the Harker Heights Police contact you?

A. Yes. Early in the morning, there was like, well, five or six men going around from door to door asking anybody if they had seen or heard anything and I gave the description to the men and I told them exactly what I saw and they said that someone would contact me later.

Q. All right. Let me ask you one more thing about your description of this man. Did he have any facial hair at all?

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A. He just looked very -- very, very smooth, soft skin, no facial hair whatsoever.

Q. All right.

A. Other than the eyebrows pointing down.

Q. Did the Harker Heights Police then put you in touch with the investigators from the District Attorney's office? Is that correct or what happened?

A. Well, I don't know because they just said that someone would be coming to see me directly, and then Mr. Garrison had come to see me and then a man from the district attorney Cappy Gads' office came to see me.

Q. The Harker Heights Police came to see you this same morning of August 7th; is that right?

A. Right.

Q. Now when did you see the investigators from the district attorney's office?

A. Now that, I don't remember. That, I don't remember.

Q. Was that Garland Smith and some other gentleman from --

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A. It was another man from the office, I don't know his name. I don't know if it was Jarland Smith. All I know is, it was a tall, thin man with a mustache --

Q. All right.

A. -- that had come to the Oasis to take me up to the courthouse and the other man that talked to me was a short, dark-haired man and I don't know which one was Jarland.

Q. All right. And you don't know how long after the shooting this was?

A. It was just a couple of hours.

Q. All right.

A. Before daylight.

Q. That same morning then?

A. It was before daylight.

Q. That --

A. Right at daylight is when the police came.

Q. All right. And then when did the investigators from the D.A.'s office come?

A. This, I don't know. This, I don't remember.

Q. It wasn't that same day?

A. It wasn't, I don't think so. I

think it was a day or two later.

Q. All right. And, in the meantime, did you learn that some person had been arrested and charged with the shooting of a police officer at that location?

A. Yes, I did, uh-huh.

Q. And that was Mr. Barefoot?

A. Yes.

Q. Did you happen to see him on television?

A. Yes, I did.

Q. When was that, that same day or the next day?

A. This, I don't know.

Q. Was it the same day he was returned to --

A. Was it the same day? No, no.

Q. It was the same --

A. Whenever they picked him up.

Q. When he was picked up in Houston and brought back to Bell --

A. Right, and they showed him on the TV bringing him back.

Q. Did you get a good look at him on TV?

A. Yes, and I said definitely not, this

is not the man I saw. I told all my friends, my boss, everybody, that it just was not the man that I saw.

Q. And then, after you had seen him on television, that was when you went down to the District Attorney's office?

A. Right.

Q. And did they show you some pictures of some people --

A. Right, they showed me maybe six, seven shots of different people.

Q. And one of those was Barefoot's picture?

A. Right, right.

Q. Did you identify any of those pictures as being the man that you saw running down the street?

A. No, absolutely not.

Q. Did you tell the investigators that --

A. Right, I told them that I didn't recognize any of them.

Q. All right. Did the district attorney's investigators take any kind of written statement from you?

A. I don't know if it was a written

statement, I just know that they had a tape recorder.

Q. All right. And did you give them this same description of the man you saw?

A. Yes, I did.

Q. Did anyone say anything about the number of shots that had been fired?

A. Okay. First going -- when the man picked me up from the Oasis and --

Q. The investigator from the D.A.'s office?

A. Right -- and going to the courthouse for the statement, he had told me something about Barefoot had three missions to carry out; one was to throw a bomb in the club, in the Silver Spur; one was to shoot a policeman in the head, and one was to shoot and kill each person that worked in the office as they came in, wait for Jimmy Pellegrino and then shoot and kill him and rob his safe.

Q. And that was at the Oasis where you were working?

A. Right, right.

Q. Did you know Mr. Barefoot?

A. No, I have never seen the man.

Q. Did anyone at the Oasis, as far as you know, know him?

A. This, I cannot say. This, I do not know whatsoever.

Q. Did this frighten you when they told you that?

A. Yes, it frightened me. It scared me to death, so I asked the man if he would ask Mr. Pelligrino -- he asked me if we had any kind of safety precautions on the door, like a bolt lock or a peephole and I told him that we didn't have anything but a -- what do you call those things, those clasp things --

Q. Un-huh.

A. -- and he said that I need to tell Mr. Pelligrino to get bolt locks and a peephole and I told him that he wouldn't listen to me, could he tell him. Well, he did tell Mr. Pelligrino to get the bolt locks and the peephole and he went out right away and got them.

Q. Was this before or after Mr. Barefoot had been arrested?

A. This was after.

Q. All right. Now you gave the same description to the police officers?

A. Yes, I did.

Q. And the investigators?

A. When they came from door to door and the investigators, yes.

Q. And an assistant district attorney who talked to you, you gave him the same description?

A. Yes, yes.

Q. Now what did anyone say about the number of shots that had been fired?

A. Okay. When I first came into the room and they were sitting there talking to me, they asked me -- well, first off, they asked me what I saw and everything else and I asked them first, I said tell me one thing. I said was there three shots, and they asked me why and I said I definitely heard three shots ring out, and then I commenced to tell my story and they told me that, could it have been an echo, and I said no, that the shots were too spaced to be an echo.

It was like -- almost like a space in between where you have got to cock a gun or something, I said, but there was too much of a pause in between each shot. And they told

me no, that there was only one shot and -- because I asked them, I said could the policeman have shot, and they said no, that the policeman's gun was not even fired, it was still in the holster.

Q. Now these shots were spaced so that, in your opinion, they couldn't have been fired from an automatic weapon?

A. No way, no way, no way. And it could not -- they were spaced so much that it couldn't even have been an echo.

Q. All right. But they told you only one shot had been fired?

A. They told me only one shot had been fired, and I asked them, I said did you check on the grounds for other evidence or anything. I said I definitely heard three shots. I said maybe if you-all look around or something, you could find bullets. I said but there were definitely three shots ring out.

Q. Uh-hun. But they insisted only one had been fired?

A. They said that only one had been fired.

Q. All right. And now about this

discrepancy in your description and the description of Mr. Barefoot; what did they tell you about that?

A. Okay. Now I had told them that the man seemed so much heavier than Mr. Barefoot and they told me that Mr. Barefoot was in jail for two weeks and that he must have lost weight.

Q. All right.

A. And I said you can lose weight, but not height.

Q. How about the hair length and the description of no facial hair?

A. Okay. The hair length was not even mentioned. They asked me if he had a mustache and I told them no. They asked me if he had sideburns and I told them no, that he had very, very smooth skin and probably the age between 22 to 25.

Q. Did they tell you at that time that they intended to use you as a witness for the State against Mr. Barefoot?

A. Yes, they did.

Q. All right. And what did they tell you now to handle these differences in the description and in the number of shots, the

physical description and the number of shots? Did they tell you they would just ask you questions that you could answer yes or no or --

A. Okay. What they said -- I asked them, I said now how do I go about -- I said I've never been in a courtroom and I've never ever gone through this before, which I was all shook up and scared to death and -- especially when they told me that the man was going to kill everybody in the Oasis, I figured, well, if he's got buddies around, maybe they'll come shooting, too, and it just shook me all up and everything and I was really scared, so I asked them how do I answer the questions, I've never been through this before, and they said anything we ask you, you just answer yes or no to.

Q. All right. Now you recall that they asked Mr. Barefoot to stand up in the courtroom, so you could look at it -- look at his height and so on?

A. Right.

Q. And he appeared to be about five seven or five six or something like that?

A. Right.

Q. And you said that that generally

fitted the description of the man that you saw?

A. No, my mind was thinking the eye area. When I looked at the man, I wasn't fair. I -- I was so shook up, I was scared and I was not fair in my decision and --

Q. You said that because that was the height of the man that stood up in the court room; is that right?

A. Yes, yes, and he asked me did he resemble the man I saw and I looked at the eye area and I said he could resemble him, and after I said it, I felt just horrible because, after I looked at -- and then they excused me and then, after I kept looking, it was like a difference between Mutt and Jeff. Barefoot had long, straggly hair, there was no possible way the hair could have grown within two weeks like this. Barefoot was very, very thin, very short legs, but I had already given my answer and I didn't know how to correct it in the courtroom or anything.

And I looked at his face and his face looked freckly. I don't know if he's got freckles, but it looked freckly and I thought no way, no way is this the man that I

saw. The man I saw was like the difference between Mutt and Jeff on Barefoot. It's -- the man I saw was so much taller and bigger and Barefoot was so much smaller -- another thing in the room, when I told them about the bulges in the pocket -- I don't know the man's name that was questioning me, I don't know if it was Garland Smith; a little short, dark-haired guy. Anyhow, when I told him about the bulges in the pocket, that I looked for bulges in the pockets, he said, "Just a minute, Mrs. Richards, let me show you something."

He walked out of the room which I didn't know what he was doing. He walked out of the room, came back in, walked by me swiftly and asked me if I noticed anything different. Well, I didn't know what he was talking about, didn't know what he was doing and I said, "No, what?" and he said -- he pulled out a gun in his back hip pocket and he said that "Now you didn't notice the bulge, did you?" Well, I wasn't looking for the bulge, so within the seconds that he walked by and not looking for what he was talking about, like I did with this man running down the street for the bulges in

his pocket, I had plenty of time to see his bulge and, not knowing what this guy was doing, I didn't look for any bulges in his pockets.

Q. But you were looking for bulges --

A. Exactly, that's what I said. I was looking -- now the man that was running down the street, I was definitely looking for bulges in his pockets in case there was a gun -- in case it was shots that I heard and if he had a bulge in his pocket, but when this Garland, or whoever it was, ran by, you know, he just -- it's like you going out of the room and coming in and saying, hey, what did I do now, you know, and so he pulled this gun out of his back pocket and he said see, he said, then there could have been a bulge. He said this is the type of gun that Barefoot used.

Q. Okay.

A. And he said -- it was a very short, flat gun.

Q. Okay. So the district attorney and his investigators impressed upon you the fact that Barefoot was the man who did the killing?

A. Yes, definitely.

Q. And they impressed upon you the fact

that he had intended to kill you, also?

A. Yes.

Q. And you were frightened?

A. Yes, I was scared to death and I still am.

Q. And you went along with the testimony they suggested?

A. Yes, yes, and in my heart, I know I did, yes.

Q. All right. And then --

A. And then I thought maybe, well, maybe they're right and maybe this guy running was just a guy with him or something; you know, maybe I'm all wrong, but the incidents that happened at the time of the shooting, at the time I seen the man fleeing and from the time I seen the police car speed up the street, it all happened within -- every second together and it just seemed like it should be the man I saw.

Q. And you have been frightened for the four years since then?

A. Yes. Yes, I have.

Q. And anything else? Has your conscience bothered you?

A. My conscience has eaten me up, yes.

Q. And that's the reason you contacted us?

A. Yes. I just felt the fact that I had to tell somebody it's not fair. I just -- I do not feel it was right and it was wrong of me. It was wrong of me, I -- I was wrong. I was wrong.

Q. And are you telling us --

A. I made a false statement in a courtroom. I made a false statement and I'm admitting it.

Q. You're telling us here today that Barefoot was not the man you saw running down the street on August 7th, 1978?

A. Exactly. He was -- his hair, his build, nothing was the same. Nothing, nothing was the same, nothing. And it was just the thought, well, maybe they've got the right guy and I'm wrong.

Q. All right.

A. And that was the whole thing of it. And I just went along with them.

Q. Did the defense lawyers representing Mr. Barefoot ever contact you and talk to you about -- and get a description from you of the

man that you saw running down the street or discuss that with you at any time?

A. I can't remember. Mr. Garrison had come to the Oasis and --

Q. Now he's an investigator who worked for Mr. Brown and Blythe, or whatever that other lawyer's name is, right?

A. I don't know who they are.

Q. You never met them?

A. See, these are just people that had come to me and I told them what I saw.

Q. Did you tell Mr. --

A. I don't know then --

Q. -- Mr. Garrison that Barefoot was not the man or was that during the time you were frightened?

A. Yes, yes. I told him he was not the man because he came to the office -- I didn't say Mr. Barefoot because I hadn't seen Mr. Barefoot, other than TV, and I said the man -- I gave the description of the man I saw and I said it was not the same, this man was shorter than the man that I saw, and smaller.

Q. Okay. And you have told a lot of people since --

A. I have told absolutely everybody I know. Like I said, it's eaten my stomach out for years and years and years; it has eaten me. My sons -- many, many times I have broken down and cried and felt so guilty and horrible, I'm just inches within a breakdown because I just -- I feel I lied. I feel I lied.

Q. And then, when you learned that Mr. Barefoot is supposed to be executed on January 21st, that's when you -- 25th, that's when you contacted us?

A. Then it really tore me up, yes, yes. I was going to go to Austin. I didn't know who to trust, I didn't know who to believe.

Q. And the reason you wanted to come down here to Austin today to have this deposition taken was because you were afraid to have it taken in Belton or Bell County?

A. Yes, I didn't trust anybody; just by the way it was going and the things that went on, I just didn't trust their judgment anymore and I didn't want to have any part of it.

Q. But the district attorney and his investigators were aware that -- of your statement that you heard -- definitely heard

three shots --

A. Yes, definitely, they were aware.

Q. -- and your description of the man you saw?

A. They were aware. I even asked them did they look around on the ground for bullets or anything. I told them three times.

Q. Did you tell them that you didn't think Barefoot was the man?

A. Yes.

Q. What did they say?

A. Nothing, and then I said -- I also told them, well, maybe in the eye area, he resembles him and then after, like I say, after I studied the man -- because when they were asking me questions, I wasn't looking at the man, and then after they told me to look at the man, did he resemble him, and I looked at the eye area and I said he could resemble him and then he asked me, now make -- "Do you think you can make a positive description of the man? Is this the man you saw running?" and I said "No, I am not sure."

Q. All right.

A. But I said no loudly because of the

first mistake I made.

Q. But, as a matter of fact, you were sure he was not the man?

A. I was positive he was not the man.

Q. When you made that statement?

A. Yes, yes, and I lied.

MR. GRAY: I believe that's all.

STATE OF TEXAS)
)
COUNTY OF TRAVIS)

I HEREBY CERTIFY that I have read the foregoing deposition and that this deposition, together with my corrections, is a true record of my testimony given at this deposition.

Mary Richards
Mary Richards

SUBSCRIBED AND SWORN TO BEFORE ME this, the 28 day of December A.D., 1982.

Rita Easley
Notary Public in and for
Bell County

THE STATE OF TEXAS)
)
COUNTY OF TRAVIS)

I, WILLIAM A. BOYD, JR., Certified Court Reporter and Notary Public in Travis County for the State of Texas, do hereby certify that the facts stated by me in the caption hereof are true; that the said witness did make the above and foregoing answers in response to questions propounded as shown; that I did, in shorthand, report said proceedings; and that the above and foregoing typewritten pages contain a full, true and correct transcription of my shorthand notes taken on said occasion.

WITNESS my hand and seal of office this, the 14th day of December, A. D., 1982.

William A. Boyd, Jr.
WILLIAM A. BOYD, JR.
Certified Court Reporter and
Notary Public in Travis County
for the State of Texas

CERTIFICATE OF CHARGES:
Charges for preparation of Transcript (Orig) 80.80
Mileage.....
TOTAL FEES CHARGED TO Defendant ... 80.80

William A. Boyd, Jr.
Reporter

#102,237CS

BE IT REMEMBERED AFTER A SHORT RECESS WITH ALL PARTIES AGAIN PRESENT IN OPEN COURT, THE FOLLOWING PROCEEDINGS WERE HAD, TO-WIT:

IN THE PRESENCE OF THE JURY

MR. LEITNER: YOUR HONOR, THE STATE OF TEXAS WOULD AT THIS TIME CALL MARY RICHARDS TO THE WITNESS STAND.

THE COURT: MARY RICHARDS. YOU WERE NOT PRESENT WHEN THE WITNESSES WERE SWORN AWHILE AGO, WERE YOU?

MR. BAILIFF: RAISE YOUR RIGHT HAND.

(AT THIS POINT THE WITNESS IS SWORN BY THE COURT)

MARY RICHARDS

WAS CALLED AS A WITNESS, WAS DULY SWORN, AND WAS EXAMINED AND UPON EXAMINATION TESTIFIED AS FOLLOWS, TO-WIT:

DIRECT EXAMINATION BY MR. LEITNER

MR. LEITNER: MAY I PROCEED, YOUR HONOR?

THE COURT: YES, SIR.

Q STATE YOUR NAME PLEASE.

A MARY RICHARDS.

Q MRS. RICHARDS, ONCE AGAIN, TRY TO SPEAK UP SO THAT ALL IN THE ROOM CAN HEAR YOU.

Exhibit "D"

A MARY RICHARDS.

Q MRS. RICHARDS, CAN YOU TELL US WHERE YOU LIVE? WHAT YOUR ADDRESS IS?

A ONE ELEVEN EAST VALLEY ROAD, HARKER HEIGHTS.

Q CAN YOU TELL US WHETHER OR NOT THAT WAS YOUR ADDRESS BACK ON AUGUST THE SEVENTH OF NINETEEN SEVENTY-EIGHT?

A YES, SIR, IT WAS.

Q IF I COULD PLEASE HAVE YOUR ATTENTION OVER TO THE SCENE DIAGRAM YOU SEE AGAINST THE WALL IN THE COURTROOM, I'D ASK YOU IF YOU WILL PLEASE TO WALK TO THAT DIAGRAM AND I'LL WALK THERE WITH YOU AT THIS TIME.

A OKAY. (WITNESS COMPLIES)

Q YOU CAN JUST STAND RIGHT HERE, MRS. RICHARDS.

THE COURT: LET ME CAUTION THE WITNESS. YOU HAVE TO SPEAK LOUDLY ENOUGH SO THAT EVERYBODY BACK OVER IN THIS SECTION OF THE ROOM CAN HEAR YOU. THE COURT REPORTER PARTICULARLY HAS TO HEAR EVERY WORD YOU SAY SO WHEN YOU'RE TALKING TO MR. LEITNER, REMEMBER YOU'RE SPEAKING TO EVERYBODY HERE.

Q AT THIS TIME I JUST WANT TO ASK YOU IF YOU CAN RECOGNIZE ON STATE'S EXHIBIT NUMBER TWELVE WHEN WE'RE TALKING ABOUT BUSINESS ONE-NINETY, AMY LANE AND ANN BOULEVARD. ARE YOU FAMILIAR WITH THE LOCATION THAT I'M NOW TALKING ABOUT?

A RIGHT, YES.

Q CAN YOU TELL THIS JURY, TO YOUR BEST RECOLLECTION OR TO THE BEST WAY YOU CAN ESTIMATE IT, IF YOU'RE LOOKING AT AMY LANE HERE AND YOU'RE LOOKING AT ANN BOULEVARD OVER HERE ON STATE'S EXHIBIT NUMBER TWELVE, THIS BEING VALLEY ROAD, CAN YOU POINT OUT TO YOUR BEST ESTIMATE USING THIS AS BOUNDARIES FOR THIS BLOCK, WHERE YOUR HOUSE WOULD BE SITUATED ON VALLEY ROAD?

THE COURT: NOT --

MR. LEITNER: SHE HASN'T REALLY SAID ANYTHING YET, JUDGE, SHE'S JUST TALKING TO HERSELF.

Q WHEN YOU'RE ACTUALLY STARTING TO TESTIFY, YOU HAVE TO TALK UP.

A NOW AMY IS --

Q I WANT YOU TO LOOK. THIS BEING BUSINESS ONE-NINETY, KILLEEN BEING IN THAT DIRECTION, DO YOU KNOW WHERE YOU ARE NOW?

A OKAY.

Q OKAY. THIS IS AMY AND THIS IS ANN. THIS IS VALLEY ROAD. FIRST OF ALL I'LL ASK YOU, WHICH SIDE OF THE STREET DO YOU LIVE ON?

A ON THIS SIDE. I'M NOT GOOD WITH DIRECTIONS.

THE COURT: I UNDERSTAND, MAAM. BUT ANYTHING YOU SAY WE MUST HAVE ON THE RECORD -- ANYTHING.

Q JUST POINT OUT IF YOU WILL WITH YOUR FINGER TO THE BEST OF YOUR KNOWLEDGE WHERE YOUR HOUSE IS LOCATED ON

VALLEY ROAD? JUST POINT IT OUT AND YOU WON'T HAVE TO SAY ANYTHING AT THIS TIME. I'LL LET YOU GET BACK TO THE MICROPHONE.

A I'M MIXED UP ON THE DIRECTIONS.

Q I'LL TELL YOU WHAT. GO AHEAD AND HAVE A SEAT AGAIN. WE'LL TRY OUR BEST TO WORK IT OUT.

A (WITNESS RETURNS TO WITNESS STAND.)

Q THINK BACK TO YOUR LOCATION JUST A SECOND AND KNOWING WHERE BUSINESS ONE-NINETY IS AND KNOWING WHERE VALLEY ROAD IS, IS YOUR HOUSE ON THE SIDE OF THE STREET THAT WOULD LOOK OUT TOWARDS BUSINESS ONE-NINETY OR IS YOUR HOUSE ON THE SIDE OF THE STREET THAT IF YOU STEPPED ON YOUR FRONT PORCH YOU'D BE LOOKING AWAY FROM BUSINESS ONE-NINETY?

A IT WOULD BE LOOKING TOWARDS BUSINESS ONE-NINETY.

Q WOULD THAT THEN PUT YOU ON THIS SIDE OF THE STREET?

A RIGHT.

Q OKAY. AND WOULD YOU TELL US WHETHER OR NOT -- OR BEST YOU CAN, IF YOU'RE COMING FROM AMY LANE AND GOING TOWARDS ANN BOULEVARD, WOULD YOU SAY THAT YOUR HOUSE IS HALF WAY DOWN THE STREET, A QUARTER OF THE WAY DOWN THE STREET OR WHAT?

A IT'S ABOUT HALF WAY.

Q WOULD IT THEN BE A FAIR ESTIMATE TO SAY THAT YOUR HOUSE WOULD BE SOMEWHERE IN THIS AREA?

A RIGHT.

Q AND YOUR NAME IS MARY RICHARDS, IS THAT CORRECT?

A RIGHT.

Q MRS. RICHARDS, I'D LIKE TO DRAW YOUR ATTENTION BACK TO THE EARLY MORNING HOURS OF AUGUST THE SEVENTH OF NINETEEN SEVENTY-EIGHT, THAT BEING A MONDAY MORNING. AND I'D ASK YOU IF BETWEEN LET'S SAY FIVE O'CLOCK AND SIX O'CLOCK, OR MORE SPECIFICALLY BETWEEN FIVE FORTY AND FIVE FIFTY, WHERE WERE YOU ON THAT DATE?

A IN BED.

Q WERE YOU IN BED AT THE SAME HOUSE ON VALLEY ROAD AS YOU'VE ALREADY DESCRIBED FOR THE JURY?

A RIGHT.

Q WERE YOU LIVING THERE BY YOURSELF AT THAT TIME OR DID YOU HAVE ANYBODY WITH YOU?

A I HAVE TWO BOYS AND THEY WERE WITH ME.

Q WHAT AGE ARE THOSE TWO BOYS?

A TWELVE AND ELEVEN.

Q ON THIS PARTICULAR DATE AND PARTICULAR TIME THAT I'VE ALREADY QUESTIONED YOU ABOUT, CAN YOU TELL US WHETHER OR NOT YOU HEARD OR SAW ANYTHING UNUSUAL HAPPEN?

A I WAS AWAKE ALL NIGHT AND I WAS JUST LAYING IN BED AND I HEARD SOMETHING LIKE A SHOT. AND I THOUGHT TO MYSELF, MY GOD, THAT SOUNDED LIKE A SHOT. AND THEN ALL OF A SUDDEN I HEARD ANOTHER ONE AND I SAT UP IN BED ON

THE SIDE OF MY BED AND MY BED IS RIGHT DIRECTLY AT THE WINDOW. I CAN TOUCH MY WINDOW SILL LIKE THIS AND --

Q LET ME INTERRUPT YOU JUST FOR A SECOND. YOU SAID YOUR BED IS RIGHT AT THE WINDOW?

A UH-HUH.

Q IS THAT WINDOW THEN FACING VALLEY ROAD OR IS IT FACING SOME OTHER DIRECTION?

A IT'S FACING VALLEY ROAD RIGHT AT THE END OF THE HOUSE.

Q SO YOUR BEDROOM OR YOUR BEDROOM WINDOW WOULD THEN BE IN THIS AREA FACING VALLEY ROAD. IS THAT CORRECT?

A RIGHT.

Q AND THE WINDOW ITSELF WOULD BE OPEN TO VALLEY ROAD?

A RIGHT.

Q TELL THIS JURY IF YOU WILL PLEASE, WHAT YOU THEN EITHER SAW OR HEARD AS YOU GOT UP AND WENT TO THE WINDOW THERE THAT FACED VALLEY ROAD.

A OKAY. I HAD A BROKEN WINDOW AT THE TIME. THERE WAS A BIG CHUNK OUT OF THE WINDOW AND IT'S HALF A WINDOW. AND I HEARD THE DOGS BARKING UP AND DOWN THE STREET SO I THOUGHT WELL, MAYBE IT WAS A SHOT. AND JUST THEN WHEN I HEARD THE DOGS I LOOKED OUT THE WINDOW AND PUT MY FACE ON THE SCREEN OF THE WINDOW AND I SAW A MAN RUNNING DOWN WEST I GUESS IT WOULD BE.

Q SO WE'RE SURE ABOUT THE DIRECTIONS, WAS HE RUNNING

FROM AMY TOWARDS ANN OR FROM ANN TOWARDS AMY? WHICH WOULD BE THE DIRECTION?

A OKAY -- HE WAS RUNNING FROM AMY TO ANN.

Q OKAY. WOULD THAT THEN BE IN THIS DIRECTION AS WE'RE SHOWING ON STATE'S EXHIBIT NUMBER TWELVE?

A UH-HUH.

Q CAN YOU TELL US TO THE BEST OF YOUR RECOLLECTION, WAS HE RUNNING IN THE MIDDLE OF THE STREET, WAS HE RUNNING CLOSER TO THE CURB ON YOUR SIDE OR WAS HE RUNNING CLOSER TO THE CURB ON THE OTHER SIDE?

A HE WAS ACROSS THE STREET FROM MY HOUSE AND HE WAS RUNNING CLOSE TO THE CURB. THE CURB IS LIKE THIS AND HE WASN'T REALLY RUNNING IN THE CURB BUT ON THE EDGE OF THE STREET.

Q AND WHEN YOU FIRST SAW HIM WAS HE DIRECTLY IN FRONT OF YOUR HOUSE OR WAS HE COMING UP?

A NO, HE WAS COMING UP AND HE WAS CATTY-CORNER FROM OUR HOUSE -- OKAY, THE HOUSE ACROSS THE STREET FROM ME, HE WAS OVER ON THIS NEXT HOUSE HERE, CATTY-CORNER FROM ME.

Q WOULD YOU SAY THAT YOU SAW HIM SOMEWHERE IN THIS AREA AS WE LOOK ON THE DIAGRAM AND DID HE RUN THEN PAST YOUR HOUSE?

A YES.

Q TO THE BEST OF YOUR RECOLLECTION, MRS. RICHARDS, WHA

TIME WAS THIS?

A I USUALLY GET UP ABOUT FIVE THIRTY IN THE MORNING AND THE LAST TIME I HAD LOOKED AT THE CLOCK OR GLANCED AT THE CLOCK IT WAS BETWEEN TWENTY TILL OR QUARTER TO FIVE.

Q SOMEWHERE IN THERE ABOUT FIVE FORTY-FIVE?

A SOMEWHERE IN THERE. BUT THIS WAS BEFORE THE HAPPENING THAT I GLANCED AT THE CLOCK.

Q THE TIME THAT YOU ACTUALLY SAW THE MAN RUNNING, IS THAT THE TIME YOU SAID IT WAS FIVE FORTY TO FIVE FORTY-FIVE OR BEFORE?

A NO, IT WAS BEFORE THEN.

Q CAN YOU TELL THIS JURY THE BEST AS YOU CAN RECOLLECT WHAT THE DESCRIPTION WAS OF THE INDIVIDUAL THAT YOU SAW RUNNING DOWN VALLEY ROAD THERE ON THE EARLY MORNING HOURS OF AUGUST THE SEVENTH, NINETEEN SEVENTY-EIGHT?

A I DID LOOK FOR A DEFINITE DESCRIPTION BECAUSE I THOUGHT IF IT WAS A GUN SHOT I WANTED TO GET SOME KIND OF DESCRIPTION OF THE MAN. OKAY. HE WAS BIG BUILT, KIND OF MUSCLE BOUND LIKE UP AT THE TOP AND SLIMMED AT THE WAIST. HE HAD AUBURN TYPE OF HAIR WHICH I WAS A HAIR DRESSER SO I WATCHED FOR THE HAIR. AND HE HAD AN AUBURN TYPE OF HAIR. IT WAS WAVY IN THE BACK AND CAME TO ABOUT THIS LENGTH HERE. HE DIDN'T HAVE A LONG NECK OR ANYTHING IT WAS JUST VERY MUSCULAR.

Q IF I COULD STOP YOU JUST FOR ONE SECOND. EXPLAIN THE WAY THE HAIR LOOKED IN THE FRONT AND ON THE SIDES.

A OKAY. ON THE SIDES IT LOOKED LIKE IT COULD HAVE BEEN STYLED AT ONE TIME. THE SIDES SORT OF SWEPT BACK TO THIS DIRECTION HERE. THE BACK WAS VERY WAVY AND HE HAD LIKE A COARSER HAIR, COARSER TYPE OF HAIR. IT WASN'T A FINE TYPE OF HAIR. IT WAS A THICK, COARSE TYPE OF HAIR.

Q GO ON FURTHER AND TELL US WHAT YOU REMEMBER.

A OKAY. I WATCHED HIM AND I KEPT -- I ACTUALLY LOOKED FOR A BULK IN HIS POCKET OR SOMETHING IN HIS HAND. OKAY, THE MAN RAN SORT OF FUNNY. IT WAS A JOGGING TYPE OF RUN. IT WASN'T A REAL FAST RUN OR ANYTHING AND SO I WATCHED TO SEE IF IT WAS A SHOT MAYBE THE MAN WOULD RUN INTO THE CREEK. HE BY-PASSED THE CREEK AND I WATCHED HIM. AND WHEN HE RAN HE RAN FUNNY AND HIS HANDS WERE STRAIGHT UP LIKE THIS. THEY DIDN'T, YOU KNOW -- WHEN YOU NORMALLY RUN YOU RUN WITH YOUR HANDS GOING LIKE THIS. THEY WERE STRAIGHT UP LIKE THIS. AND IT WAS LIKE HE WAS IN A DAZE OR SOMETHING. HE WASN'T -- USUALLY WHEN YOU'RE RUNNING YOU'RE LOOKING AT DIRECTIONS BUT THIS MAN WAS STARING STRAIGHT AHEAD. HE DIDN'T TURN FROM SIDE TO SIDE. I HAD MY FACE ON THE WINDOW, ON THE SCREEN AND I ALMOST HOLLERED HEY TO HIM TWICE JUST FOR FACE VALUE. I SAW THE MAN FROM THE SIDE.

Q COULD YOU TELL AT THAT TIME WHETHER OR NOT HE HAD SOMETHING IN HIS HANDS OR COULD YOU SEE FROM WHERE YOU WERE?

A NO, I COULDN'T TELL.

Q ALSO, DID YOU GIVE US AN ESTIMATE ON THE HEIGHT OF THAT INDIVIDUAL? I'M NOT SURE IF I REMEMBER HEARING IT.

A OKAY. HE WAS -- I FIGURED HIM TO BE ABOUT MY HEIGHT, BETWEEN FIVE-FIVE OR FIVE-SEVEN. HE WAS BIG FOR A MAN, BIG BUILT FOR A MAN BUT HE WAS SHORT FOR A MAN AND I FIGURED HIM TO BE ABOUT FIVE-FIVE OR FIVE-SEVEN.

Q CAN YOU TELL THIS JURY HOW FAR YOU SAW THAT INDIVIDUAL RUN DOWN VALLEY ROAD?

A OKAY. HE RAN -- HE BY-PASSED THE CREEK. WHEN HE BY-PASSED THE CREEK I WATCHED HIM FOR ABOUT TWO HOUSES UP -- TWO TO THREE HOUSES UP AND THEN WE HAD A TREE THAT BENDS OVER LIKE THIS SO AFTER HE PASSED THAT I EVEN WENT TO THE FRONT DOOR AND OPENED THE FRONT DOOR TO SEE IF I COULD SEE HIM BUT THE TREE WAS STILL BLOCKING THE VIEW. AND BY THAT TIME THE POLICE HAD SPED UP THE STREET. SO WHEN THE POLICE SPED UP THE STREET I THOUGHT TO MYSELF, IF THE MAN WAS GOING FOR HELP IT WAS AN ACCIDENTAL SHOOTING OR SOMETHING. THE POLICE CAME BY TOO FAST, YOU KNOW, SO THEN THE NEXT MORNING OR A COUPLE HOURS LATER THE POLICE CAME TO THE DOOR AND ASKED IF WE

HAD SEEN OR HEARD ANYTHING.

Q IF YOU HAD TO GIVE US A POSSIBLE DESCRIPTION OF WHERE YOU LAST SAW HIM ON VALLEY ROAD, CAN YOU TELL US IN REFERENCE TO WHETHER HE WAS CLOSEST TO THE LAST HOUSE ON THE BLOCK, THE SECOND HOUSE ON THE BLOCK, THE THIRD HOUSE ON THE BLOCK OR SOMETHING LIKE THAT?

A FROM THE LAST TIME I SAW HIM IT WAS ABOUT TWO-- POSSIBLY THREE HOUSES UP FROM ME ON THE OTHER SIDE. NOW WE HAVE A VACANT LOT AND A CREEK RIGHT NEXT TO US BUT THERE IS A HOUSE, THE CREEK, A TRAILER AND ANOTHER HOUSE TO WHERE I WATCHED THE MAN. WE ALSO HAVE A STREET LIGHT THAT SHOWN RIGHT DOWN ON HIM TO WHERE I COULD SEE HIM DEFINITELY.

Q DO YOU THINK THAT YOU COULD IDENTIFY THAT INDIVIDUAL AGAIN IF YOU SAW HIM?

A POSSIBLY, YES.

Q WOULD YOU LOOK OVER THE COURTROOM AND TELL US WHETHER OR NOT YOU SEE ANYBODY IN THE COURTROOM THAT RESEMBLES OR IS OR WHATEVER IN YOUR OPINION LOOKS LIKE, RESEMBLES OR IS, WHATEVER THE SITUATION MAY BE, THE PERSON YOU SAW ON AUGUST THE SEVENTH, NINETEEN SEVENTY-EIGHT?

A THIS MAN OVER HERE RESEMBLES HIM FROM THE HAIR AND THE SIDE.

Q CAN YOU SAY FOR SURE ONE WAY OR THE OTHER OR JUST THE FACT THAT HE RESEMBLES THAT INDIVIDUAL?

A I COULD ONLY SAY HE RESEMBLES.

Q SO THE JURY KNOWS EXACTLY WHICH MAN YOU'RE TALKING ABOUT, WOULD YOU POINT HIM OUT PLEASE?

A THIS MAN HERE. (WITNESS INDICATES)

MR. LEITNER: YOUR HONOR, AT THIS TIME THE STATE WOULD ASK THAT THE DEFENDANT STAND UP SO SHE CAN SEE WHAT HIS BUILD LOOKS LIKE.

THE COURT: ALRIGHT. WOULD YOU HAVE THE DEFENDANT STAND, MR. BROWN?

Q WE'D ALSO ASK IF WE COULD, YOUR HONOR, IF HE WOULD TURN TO THE SIDE SO SHE COULD SEE THE SIDE VIEW OF THE INDIVIDUAL.

THE COURT: TURN TO THE SIDE PLEASE.

(DEFENDANT COMPLIES)

Q MRS. RICHARDS, CAN YOU TELL US WHETHER OR NOT THAT INDIVIDUAL THAT IS STANDING RIGHT NOW RESEMBLES THE INDIVIDUAL THAT YOU SAW RUN DOWN THE STREET ON AUGUST THE SEVENTH, NINETEEN SEVENTY-EIGHT?

A I WOULD SAY HE RESEMBLES HIM, YES.

Q CAN YOU MAKE A POSITIVE IDENTIFICATION ONE WAY OR THE OTHER OR YOU JUST DON'T KNOW?

A NO, I CAN'T MAKE A POSITIVE IDENTIFICATION.

Q OKAY. THANK YOU VERY MUCH, MRS. RICHARDS.

MR. LEITNER: THE STATE, YOUR HONOR, WOULD PASS THE WITNESS AT THIS TIME.

CROSS EXAMINATION BY MR. BLYTHE

Q MRS. RICHARDS, HAVE YOU AT ANY TIME GIVEN A WRITTEN STATEMENT TO THE DISTRICT ATTORNEY'S OFFICE OR TO THE BELL COUNTY SHERIFF'S OFFICE ABOUT WHAT YOU SAW?

A YES, SIR, I DID.

MR. BLYTHE: WE WOULD ASK TO BE PROVIDED WITH A COPY OF THAT STATEMENT, YOUR HONOR.

MR. LEITNER: EXCUSE ME, YOUR HONOR, I FAILED AT THIS TIME TO REMEMBER TO GIVE THEM A COPY OF THE STATEMENT. MAY THE RECORD REFLECT, YOUR HONOR, THAT I HAVE NOW TENDERED TO THE DEFENSE COUNSEL A COPY OF THIS WRITTEN STATEMENT.

MR. BLYTHE: WE NEED A MOMENT, YOUR HONOR.

THE COURT: YES, SIR.

Q MRS. RICHARDS, ARE YOU MARRIED?

A NO, I'M DIVORCED.

Q ARE YOU EMPLOYED?

A YES, I AM.

Q WHERE DO YOU WORK?

A AT THE OASIS CLUB AS A SECRETARY.

Q THAT'S THE OASIS CLUB IN HARKER HEIGHTS?

A YES, SIR.

Q THAT IS A CLUB THAT SELLS ALCOHOLIC BEVERAGES?

A YES, SIR.

Q HOW LONG HAVE YOU WORKED AT THE OASIS CLUB?

A AS A SECRETARY I'VE WORKED THERE FOR ABOUT FOUR AND A HALF MONTHS.

Q WHAT HOURS DO YOU WORK?

A I WORK FROM NINE TILL ABOUT FIVE. SOMETIMES FOUR, THREE-THIRTY.

Q NINE IN THE MORNING UNTIL FIVE IN THE AFTERNOON?

A RIGHT. UNTIL ABOUT FIVE, UH-HUH.

Q YOU STATED ON THIS PARTICULAR NIGHT IN QUESTION THAT YOU HAD BEEN AWAKE ALL NIGHT?

A YES.

Q IS THERE ANY PARTICULAR REASON YOU HAD BEEN AWAKE?

A NO, I JUST COULDN'T SLEEP.

Q WHO WAS THERE AT HOME WITH YOU THAT NIGHT?

A MY TWO BOYS.

Q WERE THEY SLEEPING IN THE SAME ROOM WITH YOU?

A NO, THEY'VE GOT A BEDROOM OF THEIR OWN.

Q HOW MANY BEDROOMS IN YOUR HOUSE?

A TWO.

Q YOUR BEDROOM THOUGH IS ON THE FRONT PORTION OF THE HOUSE TOWARDS VALLEY ROAD?

A YES, IT FACES VALLEY.

Q AND LOOKING OUT THE FRONT WINDOW OF YOUR HOUSE YOU'D BE LOOKING TOWARDS BUSINESS ONE-NINETY?

A RIGHT.

Q NOW, I WAS A LITTLE CONFUSED ON THE TIME THAT YOU

STATED A WHILE AGO. WHEN DID YOU -- WHEN DO YOU FEEL THAT YOU FIRST HEARD WHAT YOU DESCRIBED AS A GUN SHOT?

A I REALLY DON'T KNOW BECAUSE I FEEL LIKE I LOOKED AT THE CLOCK ABOUT QUARTER TILL FIVE OR TEN TILL FIVE, AROUND THEN THAT MORNING. AND AS TO THE EXACT TIME I DO NOT KNOW.

Q HAD YOU HEARD ANY CONVERSATION OR ANY DISCUSSION OF ANY TYPE BEFORE HEARING THAT GUN SHOT?

A NO, SIR.

Q DID YOU HEAR ANY CARS IN THE AREA BEFORE HEARING THAT GUN SHOT?

A NO, SIR.

Q DID YOU HEAR ANY RADIOS OR LOUD NOISE BEFORE HEARING THE GUN SHOT?

A NO, I HEARD NOTHING.

Q SO THE FIRST THING THAT ATTRACTED YOUR ATTENTION WAS WHAT YOU THOUGHT WAS A GUN SHOT?

A A GUN SHOT.

Q YOU STATED THAT YOU HEARD FIRST A SHOT AND THEN ANOTHER SHOT.

A YES.

Q CAN YOU TELL THIS JURY HOW MUCH TIME PASSED IN BETWEEN HEARING THESE TWO SHOTS?

A WHEN I FIRST HEARD THE FIRST SHOT I THOUGHT TO MYSELF, GOD, THAT SOUNDED LIKE A GUN. AND AS SOON AS I

THOUGHT THAT I HEARD ANOTHER SHOT.

Q IT'S FAIR TO SAY THAT A FEW SECONDS PASSED BY WHILE YOU WERE HAVING THAT THOUGHT. IS THAT CORRECT?

A JUST LONG ENOUGH TO THINK THAT.

Q AND YOUR IMMEDIATE REACTION AT THAT POINT WAS TO DO WHAT?

A WHAT DO YOU MEAN?

Q AFTER YOU HEARD THE SECOND SHOT WHAT DID YOU DO AT THAT TIME?

A I SAT UP IN THE BED BECAUSE I JUST THOUGHT IT SOUNDED SO MUCH LIKE A GUN SHOT.

Q IS THE HEAD OF YOUR BED DIRECTLY AGAINST THE WINDOW OR UNDER THE WINDOW?

A OKAY. I HAVE -- WHEN THE ROOM IS SQUARE LIKE THIS, THE BED WAS DIAGONAL LIKE THIS. OKAY. THE WINDOW SILL IS TO WHERE I COULD TOUCH IT.

Q WHAT DID YOU DO AT THAT POINT?

A THAT'S WHEN I SAT UP AND LOOKED OUT THE WINDOW AND THEN THE DOGS STARTED BARKING AND THAT'S WHEN I PUT MY HEAD TO THE WINDOW.

Q YOUR DOGS STARTED BARKING?

A ALL THE DOGS UP AND DOWN THE STREET. THAT'S WHAT MADE ME THINK IT MAY HAVE BEEN A GUN SHOT BECAUSE ALL THE DOGS UP THE STREET STARTED BARKING AND MINE ALSO STARTED BARKING.

Q YOU LOOKED OUT YOUR WINDOW AT THAT TIME?

A RIGHT.

Q YOU STATED THAT WHEN YOU LOOKED OUT YOU SAW AN INDIVIDUAL WHO WAS NOT DIRECTLY IN FRONT OF YOUR HOUSE BUT OFF TO THE LEFT IN FRONT OF YOUR HOUSE?

A RIGHT.

Q AND YOU SAID THAT INDIVIDUAL WAS RUNNING SOMEWHAT AWKWARDLY ACROSS IN FRONT OF YOUR HOUSE?

A RIGHT.

Q NOW, HOW FAR BACK FROM THE STREET DOES YOUR HOUSE SIT?

A I'D SAY ABOUT THE DISTANCE OF TWO FEET TO WHERE THE MAN WAS RUNNING. JUST -- IT WAS JUST --

Q WELL, WHAT I'M ASKING IS YOUR HOUSE DOES NOT SIT DIRECTLY ON THE PAVEMENT, DOES IT?

A NO, UH-HUH.

Q IT SITS BACK AWAY FROM VALLEY APPROXIMATELY HOW FAR? AS FAR AS FROM YOU TO ME OR FARTHER THAN THAT?

A I'D SAY PROBABLY TO WHERE THOSE LADIES ARE SITTING THERE.

Q THE LADY IN THE LIGHT GREEN DRESS HERE ON THE SECOND ROW OF THE COURTROOM?

A RIGHT.

Q AND THAT'S THE CURB LINE ON YOUR SIDE OF THE STREET IS THAT CORRECT?

A RIGHT.

Q NOW VALLEY ROAD AT THAT POINT, IS THIS A TYPICAL RESIDENTIAL TYPE STREET?

A RIGHT.

Q HOW WIDE WOULD YOU ESTIMATE THAT STREET TO BE? WOULD IT BE AS WIDE AS THE AREA WITHIN THIS COURTROOM FROM LEFT TO RIGHT?

A IT'S FOR TWO CARS TO GO DOWN IT. ABOUT THAT.

Q IS THERE ROOM FOR A CAR TO PARK ON EACH SIDE AND A CAR TO DRIVE DOWN THE MIDDLE ISN'T THERE?

A RIGHT.

Q SO THE ACTUAL DISTANCE THEN BETWEEN YOU AND THIS INDIVIDUAL YOU SAW RUNNING WOULD BE AT LEAST THREE CAR WIDTHS PLUS THE DISTANCE FROM YOU TO THESE LADIES ON THE SECOND ROW. IS THAT CORRECT?

A -- PROBABLY.

Q ALRIGHT. NOW IT WAS DARK AT FIVE THIRTY OR FIVE FORTY-FIVE IN THE MORNING, WASN'T IT?

A RIGHT.

Q YOU'LL HAVE TO ANSWER UP SO THE COURT REPORTER CAN TAKE YOUR ANSWER DOWN.

A RIGHT.

Q YOU STATED THERE WAS A STREET LIGHT. WHERE IN RELATION TO YOUR HOUSE IS THE STREET LIGHT?

A OKAY. THE STREET LIGHT IS ABOUT -- I'D SAY ABOUT

-- FROM MY WINDOW YOU COULD TAKE ABOUT -- TWELVE NORMAL STEPS TO THE STREET LIGHT. AND IT WOULD BE RIGHT DIRECTLY ON THE STREET AND DIRECTLY ON THE STREET. MAYBE A LITTLE INWARD ON THE GRASS.

Q WAS THE LIGHT WORKING THAT NIGHT AS FAR AS YOU KNOW?

A YES, SIR, IT WAS.

Q IN THE STATEMENT THAT YOU GAVE THE -- IT APPEARS TO HAVE BEEN GIVEN TO BERT WILKERSON, DEPUTY SHERIFF OF THE BELL COUNTY SHERIFF'S OFFICE, IS THAT WHO YOU TALKED WITH INITIALLY?

A RIGHT.

Q YOU STATED IN THIS STATEMENT THAT THE INDIVIDUAL WAS WEARING GREY PANTS.

A HE HAD GREY PANTS ON AND A WHITE T-SHIRT.

Q HOW WOULD YOU DESCRIBE THE GREY PANTS? DO YOU MEAN LIKE A KAKHI TYPE PANTS?

A NO, IT WAS LIKE A KNIT -- IT WAS A KNIT PANTS AND IT WAS POSSIBLY THE COLOR OF THAT MAN'S SUIT RIGHT THERE.

Q ARE YOU SPEAKING ABOUT THE GENTLEMAN ON THE FIRST ROW ON THE LEFT HAND SIDE?

A RIGHT.

Q WHICH WOULD BE DESCRIBED AS A GREY TYPE MATERIAL, RIGHT?

A UH-HUH

Q YOU SAY IT WAS A KNIT TYPE MATERIAL?

A UH-HUH.

Q HOW DO YOU -- WHY DO YOU FEEL IT WAS A KNIT TYPE MATERIAL?

A I KNOW MATERIALS.

Q NOW ALL OF THIS WAS HAPPENING I ASSUME IN JUST A SPACE OF SECONDS MORE OR LESS. IS THAT RIGHT?

A YES.

Q YOU MADE A LOT OF OBSERVATIONS HERE IN A VERY SHORT PERIOD OF TIME.

A THAT'S BECAUSE WHEN I HEARD THE GUN SHOT I WAS TRYING TO GET A DESCRIPTION IN CASE IT WAS A GUN SHOT.

Q YOU FEEL PRETTY CONFIDENT THAT THOSE WERE GREY KNIT PANTS THAT YOU SAW?

A YES, I DO.

Q YOU DESCRIBED A WHITE T-SHIRT. WAS THIS A LONG SLEEVE OR SHORT SLEEVE?

A IT WAS SHORT SLEEVE AND HE WAS VERY CLEAN. IT WASN'T A DIRTY SLOPPY TYPE OF THING. HE HAD THE WHITE T-SHIRT TUCKED INTO HIS PANTS.

Q WHAT KIND OF COLLAR DID THE T-SHIRT HAVE ON IT?

A IT WAS JUST A REGULAR ROUND COLLAR.

Q DID THE MAN HAVE A HAT ON HIS HEAD?

A NO.

Q ANY KIND OF CAP OR ANYTHING?

A NO.

Q WHAT KIND OF SHOES DID HE HAVE ON?

A THIS I DIDN'T KNOW. I DIDN'T LOOK DOWN AT HIS SHOES.

Q YOU STATED HE WAS NOT CARRYING ANYTHING IN HIS HANDS?

A NO.

Q YOU SAID SOMETHING ABOUT LOOKING AT HIS POCKETS TO SEE IF HE HAD ANYTHING IN HIS POCKETS.

A YES, TO SEE IF I COULD SEE A BULGE.

Q DID YOU SEE ANYTHING IN HIS POCKETS?

A NO, I DIDN'T.

Q DIDN'T SEE A THING?

A BUT I COULD ONLY SEE THE ONE SIDE OF HIM. I COULDN'T SEE THE OTHER SIDE OF HIM.

Q IF THE MAN WAS RUNNING FROM YOUR LEFT TO YOUR RIGHT AND HE WAS RUNNING STRAIGHT AHEAD, YOU WOULD HAVE BEEN LOOKING AT THE RIGHT SIDE OF HIS BODY. IS THAT CORRECT?

A RIGHT.

Q AND BY LOOKING AT HIM FROM THAT VIEW POINT AND UNDER THOSE LIGHTING CONDITIONS, YOU DID NOT SEE ANYTHING IN ANY OF HIS POCKETS ON HIS RIGHT SIDE?

A NO, SIR.

Q NOTHING IN THE FRONT POCKETS?

A NO.

Q NOTHING IN THE REAR POCKET?

A NO.

Q NOW, LET'S TALK ABOUT HIS HAIR AGAIN. YOU SAID A WHILE AGO AUBURN IN COLOR. DO YOU MEAN RED, IS THAT WHAT YOU MEAN BY AUBURN?

A IT WAS A LIKE A DARK BROWN, IT HAD AN AUBURN CAST TO IT.

Q AND A CAST TO YOU --

A LIKE A RED -- AUBURN, DARK RED.

Q DESCRIBE THE LENGTH FOR ME AGAIN.

A OKAY. PROBABLY -- PROBABLY TO HIS SHOULDERS.

Q NOW, YOU HAVE DARK COLORED HAIR THAT'S FAIRLY LONG. WAS THE HAIR ON THIS INDIVIDUAL AS LONG AS YOUR HAIR?

A AS LONG AS MY HAIR?

Q YES, MAAM.

A NO, SIR.

Q WAS IT AS SHORT AS MY HAIR?

A NO, IT WAS A LITTLE LONGER THAN YOUR HAIR.

Q COULD YOU SEE HIS FOREHEAD?

A THE BANGS SWEPT TO THE SIDE AND THE SIDES WENT LIKE THAT. LIKE I SAID IT LOOKED LIKE IT COULD HAVE BEEN STYLED AT ONE TIME.

Q COULD YOU SEE THE MAN'S EARS?

A NO.

Q DID IT APPEAR TO YOU TO BE A MILITARY HAIR CUT?

A NO, DEFINITELY NOT. NOW THE SIDES OF HIS HAIR

WAS SHORTER THAN THE BACK. IT DIDN'T BLEND IN -- THAT'S WHY I SAID COULD HAVE BEEN STYLED AT ONE TIME BECAUSE THE SIDES WERE SHORTER THAN THE BACK. THE BACK WAS LONGER THAN THE FRONT. IT DIDN'T -- IT WASN'T ONE LIKE Y'ALL WEAR AROUND.

Q NOW YOU SAID THAT THE MAN WAS RUNNING WITH HIS HANDS STRAIGHT UP.

A STRAIGHT UP. THERE WAS NO FLEX. THERE WAS JUST NO GIVE TO THEM WHERE THEY WERE GOING LIKE THIS -- THAT'S WHY IT CAUGHT MY EYE BECAUSE HE WAS RUNNING THIS WAY AND HIS ELBOWS DIDN'T BEND.

Q WAS HIS HEAD MOVING FROM SIDE TO SIDE?

A NO, HIS HEAD WAS STRAIGHT UP.

Q DID HE EVER LOOK BACK BEHIND HIM?

A NO, THIS IS WHAT I SAID. HE WASN'T LOOKING IN DIRECTIONS OR ANYTHING. THAT'S WHAT STRUCK ME SO FUNNY IS THE MAN WAS STRAIGHT AHEAD AND I ALMOST SAID HEY TO HIM TWICE JUST TO GET A FACE VALUE OF HIS FACE.

Q YOU DID NOT SAY ANYTHING?

A NO.

Q YOU DESCRIBED AWHILE AGO THAT HE SEEMED TO BE LIKE HE WAS IN A DAZE, LIKE HE DIDN'T KNOW WHAT HE WAS DOING OR SOMETHING?

A LIKE HE WAS JUST STARING STRAIGHT AHEAD.

Q LIKE A PERSON THAT DIDN'T KNOW WHAT THEY WERE DOING?

A I CAN'T SAY THAT BECAUSE I'M NOT SURE.

Q BUT IT APPEARED TO BE A DAZE -- OR YOU DESCRIBE IT AS IN A DAZED CONDITION?

A I WOULD SAY TO THAT EFFECT, I MEAN.

Q NOW, YOU WERE VERY HONEST A MOMENT AGO TO SAY THAT YOU CANNOT MAKE A POSITIVE IDENTIFICATION OF THE INDIVIDUAL THAT YOU SAW AND THAT IS THE WAY YOU FEEL, IS THAT CORRECT?

A UH-HUH.

Q ALL YOU CAN SAY IS THAT THIS DEFENDANT MERELY RESEMBLES THE INDIVIDUAL THAT YOU SAW OUT THERE THAT NIGHT?

A UH-HUH.

Q YOU CERTAINLY FELT THAT HE -- THIS DEFENDANT WAS EXACTLY THE SAME INDIVIDUAL, YOU WOULD SAY THAT RIGHT NOW WOULDN'T YOU?

A RIGHT.

MR. BLYTHE: NO FURTHER QUESTIONS, YOUR HONOR.

MR. LEITNER: WE HAVE NO FURTHER QUESTIONS OF THIS WITNESS, YOUR HONOR.

THE COURT: YOU MAY STEP DOWN, MRS. RICHARDS.

MR. LEITNER: MAY WE APPROACH THE BENCH, YOUR HONOR?

THE COURT: YES, SIR.

AT THIS POINT THERE WAS A DISCUSSION BETWEEN THE COURT

PHONE-O-GRAM® for: Will

M George Miller Austin

☑ Telephoned ☐ Please return the call ☐ Will call again ☐ Came in ☐ See me

Message Barefoot - application for Original - writ denied on December 21, 1982.

Phone _____ Date 1-7- Time 10:00 By Milliorni

EXHIBIT "E"

CAUSE NO. _____

****

IN THE
COURT OF CRIMINAL APPEALS OF TEXAS
AUSTIN, TEXAS

****

EX PARTE
THOMAS A. BAREFOOT

****

MOTION FOR STAY OF EXECUTION

The applicant, Thomas A. Barefoot, is scheduled to be executed before sunrise on January 25, 1982. He asks this Court to stay his execution.

Barefoot was convicted of capital murder and sentenced to death on November 21, 1978, Cause No. 26,812, in the 27th Judicial District Court of Bell County, Texas. The conviction and sentence were affirmed by this Court on March 12, 1980. Barefoot v. State, 596 S.W.2d 875. The Supreme Court of the United States denied certiorari on June 29, 1981. Barefoot v. Texas, 453 U.S. 913 (1981).

On August 14, 1981, the 27th Judicial District Court of Bell County, Texas, ordered that Barefoot be executed before sunrise on October 13, 1981. Barefoot's application for writ of habeas corpus was denied by the 27th Judicial District Court of Bell County, Texas, without hearing on

EXHIBIT "F"

October 6, 1981, and this Court denied Barefoot's motion for stay of execution and application for writ of habeas corpus on October 7, 1981.

On October 9, 1981, the United States District Court granted a stay of execution pending consideration of the petition for writ of habeas corpus.

Following an evidentiary hearing, conducted on July 28, 1982, the federal District Judge denied the petition for writ of habeas corpus and dissolved the stay of execution. He did, however, certify that there was probable cause for an appeal, Rule 22(b) F.R.A.P.; that the petitioner was a pauper and the appeal was taken in good faith. [Exhibit "A"]. The appeal is now pending in the United States Court of Appeals for the Fifth Circuit, No. 82-1680.

Even though the judge of the 27th Judicial District Court of Bell County was fully aware of the federal proceedings, he issued a bench warrant and had Barefoot returned to the Bell County jail, where, on December 20, 1982, over Barefoot's objection that the State Court had no jurisdiction to take such action, he was sentenced to be executed before sunrise on January 25, 1983.

Barefoot's "Application for Writ of Habeas Corpus" based upon the action of the trial judge was filed in this Court later the same day. The application was apparently denied without written opinion on December 21, 1982.

Barefoot's lawyer called the Court on several occasions

Best Copy Available

after the application was filed in an effort to find out if the Court had ruled. The last such call was to the Honorable Tommy Lowe, Clerk of the Court, on January 6, 1983. Mr. Lowe again reported that there had been no ruling by the Court.

The next day, Barefoot's lawyer was informed through a telephone call from George Miller that the Court had denied the application on December 21, 1982. [Exhibit "B"]

On December 27, 1982, while still awaiting a ruling by this Court, Barefoot's lawyers deposed Mary Richards, one of the witnesses used by the State to place him near the scene of the fatal shooting. Mrs. Richards admitted under oath that she had lied in her trial testimony with the knowledge of the Bell County District Attorney and his chief prosecutor. In addition, she informed the District Attorney, his chief prosecutor and chief investigator that she had heard three shots. This testimony was suppressed because the State's case against Barefoot was based upon the purported fact that only one shot had been fired, and that by appellant. See Appendix, Exhibits "C", [the deposition] and "D", [her trial testimony].

The State's case against Barefoot at the guilt phase of the trial was based upon the testimony of narcotic addicts, prostitutes, an individual fondly and repeatedly referred to by the prosecutor as a "homosexual", and by evidence of an unrelated extraneous offense with which Barefoot was charged before the present offense was committed.

The testimony of a respectable witness such as Mary Richards gave added weight to this suspect testimony and her material misrepresentations, made with the knowledge and at the instigation of the prosecutors, were not harmless beyond a reasonable doubt in the context of this capital murder prosecution.

This witness came forward only after an execution date had been set for Barefoot and after another death row inmate had just been executed, but her truthful testimony was available to Barefoot's trial lawyers had they made an investigation of the facts and interviewed the witnesses.

Even though Barefoot's appeal from the rulings of the United States District Court is pending in the Court of Appeals for the Fifth Circuit, the evidence newly discovered from Mary Richards and the issues based thereon were not raised and should be first presented to the State courts.

Fundamental fairness requires that this Court grant a stay of execution and order that some Court other than the 27th Judicial District Court of Bell County, Texas, conduct a hearing upon a new Application for Writ of Habeas Corpus based upon the sworn testimony of Mary Richards. The ends of justice will be best served by such procedure. Barefoot will promptly move the United States Court of Appeals to remove the federal appeal from the docket pending a determination by the State Courts and, if necessary, the United States District Court, of the critical and unlitigated is-

sues bearing directly upon the validity of his conviction for the offense of capital murder. This procedure will enable all of the Barefoot claims to be finally and completely put to rest.

In the alternative, Barefoot asks this Court to grant a stay of execution for a period of sixteen days after January 25, 1983, to and including February 10, 1983, because of the Court's delay from December 21, 1982 until January 7, 1983, in informing Barefoot that his application had been denied. This sixteen day delay, relating to a case involving the death penalty, has caused Barefoot and his lawyers irreparable harm, in view of the recently instituted Burger-Rehnquist policy of short-circuiting all federal appeals in capital cases. The unwarranted delay has prevented Barefoot from presenting a motion for stay of execution to the United States Court of Appeals for the Fifth Circuit, and has deprived his lawyers of valuable time in which to file the necessary proceedings both in the appeal and on the Richards issues.

The issues of perjured testimony in a capital murder trial, coupled with the prosecutorial misconduct there involved, are so important to the criminal justice system of this State and of the United States that in the context of "comity", both this Court and the United States Court of Appeals should cooperate in disposing of this issue along with those now on appeal.

The Court, under the circumstances of this case, has the authority and the jurisdiction to issue a stay of execution and an order for an evidentiary hearing. The United States Court of Appeals for the Fifth Circuit has the authority and the jurisdiction to hold Barefoot's appeal in abeyance until the Richards matter is resolved.

Unless this Court acts, Barefoot must seek a stay of execution from the United States Court of Appeals for the Fifth Circuit in the appeal now before that Court. Such a stay and determination of the issues there raised will not resolve the Richards issues and Barefoot will be required to seek further State and Federal relief if his present Federal appeal is resolved against him.

PRAYER

The applicant, Thomas A. Barefoot, prays that the Court issue an order staying his execution on January 25, 1983, pending his exhaustion of State remedies on the issues raised by the deposition of Mary Richards.

In the alternative, he prays that this Court order that his execution be temporarily stayed from January 25, 1983, until February 10, 1983, because of the Court's failure to notify him until January 7, 1983, that his prior application for writ of habeas corpus had been denied on December 21, 1982.

Respectfully submitted

Will Gray

Will Gray

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
[illegible] DIVISION

FILED
[illegible]
CHARLES W. [illegible], Clerk
By [illegible] Deputy

[illegible]

VS

W. J. ESTELLE, JR.

CIVIL ACTION NO. W-81-CA-191

C E R T I F I C A T E
(Rules 22(b) and 24(a), FRAP)

Came on this date for consideration the Notice of Appeal and/or Motion for Leave to Appeal in Forma Pauperis heretofore filed in the above styled and numbered matter; to-wit, a habeas corpus case in which the detention complained of arises out of process issued by a state court. Considering the record of this case and in accordance with the provisions of Rule 22(b), FRAP, the Court

HEREBY CERTIFIES THAT THERE IS PROBABLE CAUSE FOR AN APPEAL.

It further appears to this Court that, in accordance with the provisions of Rule 24(a), FRAP, and Fifth Circuit Local Court Rule 8.3,

THE PETITIONER IS A PAUPER AND THE APPEAL IS TAKEN IN GOOD FAITH.

DONE, this the 10th day of December, 19 81,

at Midland, Texas.

Lucius D. Bunton
United States District Judge

(a)

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Applicant's lawyer
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CERTIFICATION

I mailed a copy of this motion to the District Attorney of Bell County, Courthouse, Belton, Texas, 76513, and to the Honorable Robert Huttash, State's Attorney, Supreme Court Building, Austin, Texas 78711, on January 10, 1983.

Will Gray

THE STATE OF TEXAS

COUNTY OF HARRIS

BEFORE ME, the undersigned authority, on this day personally appeared Will Gray, who, being duly sworn, did depose and say that the matters of fact contained in this Motion, including sworn testimony and affidavits, are true.

Will Gray

Will Gray

Subscribed and sworn to before me on this the 10th day of January, 1983, to certify which witness my hand and seal of office.

Notary Public in and for
Harris County, Texas

DRAFT REPORT OF THE TASK FORCE ON THE ROLE OF PSYCHIATRY
IN THE SENTENCING PROCESS

The participation of psychiatrists in the criminal sentencing process is attracting an increasing degree of critical attention from those concerned with criminal justice. Although lawyers (1-4), social scientists (5-7), and the courts (8-10) have addressed many of the issues involved in psychiatric participation there has been a dearth of psychiatric comment on the subject (11). Psychiatrists have not clearly conceptualized what their role in the sentencing process should be. This places them in an uncertain position in dealing with recent legal changes which are having a powerful influence upon psychiatric testimony and reporting.

This Task Force report is an attempt to examine the sentencing process from the psychiatric point of view. We will consider recent developments that promise to alter the nature of psychiatric input into sentencing decisions; the ethical principles that ought to guide psychiatrists in the sentencing process; and how those principles affect the psychiatrist at each stage of involvement - preexamination, examination, and reporting or testifying. Finally, we will point out a number of problems that the law should consider in regard to psychiatric involvement.

RECENT DEVELOPMENTS IN SENTENCING AND THE PSYCHIATRIST'S ROLE

Traditionally, the profession of psychiatry has assisted the criminal courts in a number of ways: by assessing the defendant's competency to stand trial, by attempting to infer the defendant's state of mind at the time of the crime, and by aiding in the disposition of the defendant following

conviction. Of these activities, the last, until recently, has been the least controversial. Many psychiatrists who have opposed psychiatric participation in determining the insanity or competency of defendants have, at the same time, agreed that assisting in sentencing is a legitimate and useful role. Most forensic psychiatrists who have been willing to testify in competency and insanity hearings have also, as a rule, been willing to offer their services in the sentencing process. The few critiques of this use of psychiatry have come from non-psychiatric sources. (4-10)

This report is restricted to issues involving the use of psychiatry once the defendant has been convicted. It does not deal with the uses of psychiatry in the pre-trial process or in the actual determination of guilt or culpability. While we take no stand here on whether one form of psychiatric participation in the criminal justice process is more desirable than another, we will emphasize that there are difficult conceptual and ethical issues associated with psychiatric participation in the sentencing process.

Psychiatrists have been asked to perform a variety of functions in pre-sentencing examinations. The court may be concerned with whether or not the defendant is mentally ill, whether some form of treatment is required, and if so, which institution may most appropriately provide it. Or the court may be concerned with other defendants who are not mentally ill, but whose safety is threatened in certain penal facilities. The psychiatrist, for example, may be asked to evaluate potentially suicidal defendants, or to assess the likely adjustment of homosexual or retarded individuals to penitentiary life. In some cases, judges might be willing to forego custodial sanctions if given a measure of assurance that a combination of probation and psychiatric treatment will effect a change in the offender's behavior. This is particularly true for juveniles, first offenders, non-violent

offenders, and minor sex offenders. A related concern is whether incarceration is likely to impede or facilitate the defendant's rehabilitation. And, as will be discussed below, courts may now be particularly interested in the defendant's state of mind at the time of the crime. Any of these questions, in a variety of combinations, may define the purpose of a pre-sentencing examination.

While accepting the need for some role for psychiatry in the sentencing process, the legal system has often seemed uncertain whether to utilize this aspect of psychiatric expertise and, if so, how best to do it. As a result, the extent and nature of psychiatric participation in criminal sentencing has always been unclear and the process somewhat haphazard. Some jurisdictions have developed court clinics that are frequently called upon to offer input into the dispositional decision. In other jurisdictions, psychiatric input occurs only if the prosecution, the defense, or perhaps a probation officer seeks out a psychiatrist and obtains an evaluation of the defendant. The form of the psychiatric input is often quite informal. Rather than having the psychiatrist testify in person, some courts will accept a written report, perhaps incorporated into a probation report. The process becomes even more informal when the psychiatrist supplements the report by having a private conference with the sentencing judge.

Two recent developments may dramatically affect the present state of affairs concerning psychiatric participation in sentencing. One is the trend towards "presumptive" sentencing; the other is the newly established constitutional requirement for "individualized" capital sentencing.

Reduction in Noncapital Sentencing Discretion

Until recently, conventional wisdom in penology and law favored substantial discretion in both sentencing and parole. Although a maximum period of incarceration was generally provided by statute, sentencing judges had

almost unlimited discretion to impose either that maximum or a less severe sentence. Sentencing was thus highly individualized. During the period of that sentence, parole authorities had substantial discretion to release inmates from imprisonment before the expiration of the sentence imposed by the court, if the inmate appeared to have attained maximum potential for community adjustment. Recently, however, increasing concern has developed regarding the advisability of both parole and sentencing discretion. Some of this concern reflects the current disillusionment as to the efficacy of rehabilitation. There has also been increasing skepticism concerning the ability of participants in the criminal justice process accurately and fairly to make individualized sentencing and parole decisions. Legislative attention has been most frequently directed to minimizing parole discretion. This has been accomplished through the adoption of so-called "determinate" sentencing schemes, in which little or no discretion concerning release date is left in parole authorities or their equivalent.

A less dramatic but nevertheless significant trend has developed in regard to the role of the sentencing judge. While individualization in sentencing has not been eliminated (as has parole discretion in some jurisdictions), a number of states have adopted schemes to structure this sentencing discretion. One common model is the so-called "presumptive sentence" scheme, in which a legislatively-determined sentence is to be imposed unless specific reasons for imposing a higher or lower one are shown to exist. Lists of aggravating or mitigating factors, which can justify a sentence higher or lower than the presumptively appropriate one, are often included in the legislation.

To the extent that judicial discretion in sentencing is reduced, there may be a decreased need and demand for psychiatric input into the sentencing

decision. But the eventual outcome of this change is far from clear under the new presumptive sentencing schemes, there remains an important role for psychiatric input, either on the question of whether to impose a sentence of imprisonment at all or on the length of the prison sentence to be imposed. Some have even argued that the effect of presumptive schemes may actually be to enhance psychiatrists' role in the sentencing process (7). Evidence -- including psychiatric testimony -- that a defendant poses a high risk of serious future criminal activity may be appropriately considered as a basis for imposing a sentence longer than the presumptively proper one. (See, for example, 12.) Or, evidence that the defendant was impaired in his or her capacity to appreciate the wrongfulness of the conduct or to conform to the law may be relied upon in reducing the period of imprisonment or in imposing probation rather than imprisonment. (13, 14)

Capital Sentencing

It is clearer that psychiatrists are being called upon with increasing frequency in regard to the other development regarding sentencing practices. In a series of decisions culminating in the 1978 case of Lockett v. Ohio, (15) the United States Supreme Court has ruled that, in accord with the Eighth Amendment, a sentence of death can be imposed only after a sentencing hearing in which the prosecution and the defense are permitted to introduce evidence relating to a wide variety of potentially aggravating and mitigating considerations. Further, in Gardner v. Florida, (16) the Court held that the Eighth Amendment prohibited a sentencing judge from considering information contained in a report which had not been disclosed to defense counsel and thereby opened up for adversarial scrutiny. This appears to mean that the sort of informal involvement of psychiatrists in sentencing that sometimes occurs in non-capital cases (merely sending a report or conferring with the

judge) is constitutionally prohibited in capital sentencing.

This constitutionally-mandated "individualization" of the sentencing process has already resulted in psychiatrists being called upon to assist both sides in exploring the existence of considerations militating for and against the imposition of the ultimate penalty. Unfortunately, the rules that govern psychiatric participation in capital sentencing vary from state to state and are often unclear. (In non-capital cases there is almost a complete absence of guidelines). Some states provide for the jury to make the life or death decision, while others place this responsibility on the judge. Some provide for a non-binding jury advisory opinion or give the trial judge the power to override a jury decision to impose death. There is also substantial variation as to whether or to what extent the rules of evidence apply. A few jurisdictions provide specifically that the ordinary rules of evidence do not apply; a number require that the state's evidence in aggravation meet admissibility requirements but that evidence bearing on the presence or absence of mitigating considerations need not. There is, in many jurisdictions, a substantial question whether psychiatric testimony offered in capital sentencing proceedings has to meet ordinary requirements for expert opinion testimony.

The relevance of clinical testimony in capital cases varies among jurisdictions. Opinion testimony to the effect that the defendant is "dangerous" is almost certainly admissible under the provisions of eight states that have statutes addressing dangerousness. In three states - Oregon, Texas, and Washington - the sentencing authority must specifically find that the defendant is "dangerous" before a death sentence is imposed. In Idaho, Virginia, and Oklahoma, "dangerousness" is one of the aggravating considerations that the state may, but need not necessarily, prove in any

particular case. In two jurisdictions - Colorado and Maryland - the "non-dangerousness" of the defendant is specifically identified as one of the mitigating considerations that the defendant may attempt to establish. If a defendant undertakes to establish this (and perhaps even if s/he does not), the state may introduce psychiatric testimony and other evidence in an effort to show that mitigating non-dangerousness is not present.

When dangerousness is not included in the aggravating circumstances, it is unclear whether the state may nevertheless prove it through psychiatric testimony or other methods. In some jurisdictions, at least, the state is limited to those aggravating circumstances set out in the statutes. Even in these states, however, dangerousness testimony may become admissible to rebut a defendant's effort to establish mitigating circumstances.

In general, capital sentencing statutes provide considerable flexibility to the defendant in arguing mitigating circumstances. This flexibility is undoubtedly to some extent required by federal constitutional considerations. Many states, however, specifically include, as mitigating circumstances, proof that the defendant had an "extreme mental or emotional disturbance or that his or her capacity to understand the wrongfulness of the conduct or to conform to the law was impaired, even if this impairment was not substantial enough to constitute insanity. This is a relatively new form of "diminished responsibility" related to the defendant's mental state at the time of the crime. Psychiatric testimony is obviously relevant to the existence or absence of this mitigating consideration. Even where it is not specifically identified by statute as a relevant consideration, federal constitutional considerations probably demand that a defendant be afforded the opportunity to establish such diminished responsibility.

Psychiatric testimony may also, of course, be relevant to many other

potentially mitigating considerations. It may, for example, be relevant to whether a defendant was under "duress" or was significantly influenced by companions or others in a way which reduces culpability.

ETHICAL PRINCIPLES FOR PSYCHIATRISTS IN THE SENTENCING PROCESS

The discomfort of many psychiatrists with participation in the sentencing process, may or may not be heightened by the trend toward presumptive sentencing. But it has certainly been heightened by greater use of psychiatry in capital cases. In large part, this discomfort stems from uncertainty over the ethical issues involved. Should psychiatrists participate at all in sentencing and, if they do, what rules should guide their behavior? Before we can address this question, it is necessary to consider the more general ethical principles that underlie psychiatrists' behavior in the criminal justice setting.

The most salient ethical problem for psychiatrists participating in the sentencing process is defining their relative responsibilities to the individual being examined and to society. On the one hand, some argue that when psychiatrists conduct examinations for sentencing purposes, their primary concern must be to meet societal needs. This can be accomplished by responding to the needs of the judge who acts as the agent for societal interests. (17) In practical terms, this may require trying to obtain the maximum amount of information possible from the subject. This obligation of the psychiatrist is derived from the court's own obligations to promote justice and protect society. Although the psychiatrist's obligations to society are most apparent when the psychiatrist is directly in the employ of the court, they remain important factors even when the prosecutor or defense attorney has requested the evaluation.

On the other hand, some psychiatrists argue that their primary obligation

is to seek the good of the person they examine, even if this conflicts with societal interests. Under this model, the principles of non-maleficence (doing no harm) and beneficence (seeking to do good) are the primary principles to which the psychiatrist owes allegiance. This model may have ramifications for the manner in which the psychiatrist undertakes his or her examination. The objective of avoiding harm, for example, may lead a psychiatrist to avoid exploring psychologically painful material with a subject, even if such exploration holds promise of developing information that would be useful to the sentencing court. The perspective upon which this model is based probably fits most persons' view of the traditional doctor-patient relationship. In addition, this model may lead the psychiatrist to feel ethically obligated to direct his or her efforts toward mitigating the harshness of the penalty to be imposed.

The polemics of the argument tend to obscure the reality that neither of these two extremes can exist in pure culture. Even those who advocate a primary devotion to judicial needs are unlikely to ignore the manifest needs of the individual who is currently the focus of their attention. No ethical psychiatrist examining defendants for a court would permit obvious and previously unrecognized psychiatric illness to go unmentioned because of its irrelevance to the determination at hand. On the other side, even the most individually-oriented psychiatrist is faced with the need to compromise that orientation to meet certain broader needs, for example, the protection of society. Psychiatrists are required by law to report child abuse. They participate in civil commitment proceedings which are designed to protect the public from "dangerous" patients. They appreciate their obligation to try to prevent their patients from committing violent acts. (18, 19)

Since some compromise between these two extremes is inevitable, the only question is at what point to strike the balance. We recognize that one legal value must be given primacy in pre-sentencing evaluations - the need to determine the truth. Agreeing to participate in the sentencing process therefore obligates the psychiatrist to make a good faith effort (within the parameters described below) to conduct a thorough examination. It also precludes withholding any relevant information. Having thereby satisfied the obligation to society, however, the remainder of the psychiatrist's behavior should adhere to an individual-centered orientation. What that means in practice will be addressed in the following sections. The Task Force believes that such a devotion to the principles of non-maleficence and beneficence best comports with the continued integrity of the profession, in both forensic and therapeutic settings.

Adopting an individual-centered orientation, even while fulfilling societal needs, has the virtue of minimizing the possibility that psychiatric expertise will be coopted for political ends. It should help maintain public faith in the psychiatrist as a person concerned with the uniqueness of each individual and thus enhance the profession's ability to be of assistance to those who require psychiatric care. It enables psychiatrists to adhere to the first principle of medical ethics of the American Medical Association - "A physician shall be dedicated to providing competent medical service with compassion and respect for human dignity." (20)

Our conclusions in the discussion that follows are drawn from this particular accommodation of ethical principles. Others, starting out from different premises, might reach different conclusions. We believe, however, that the ethical starting point that we have chosen is one in which the majority of American psychiatrists would concur.

THE CONTEXT OF PSYCHIATRIC INVOLVEMENT

The Threshold Question of Participation

Many psychiatrists may be so devoted to the individual-centered orientation that any accommodation of societal interests would be unacceptable. They would advocate that the profession entirely reject all participation in the sentencing process. The Task Force believes, however, that psychiatrists can play a useful role in sentencing by meeting a number of legitimate societal needs, without unduly jeopardizing individual interests.

Any attempt to explore this area must begin with the assumption that psychiatric expertise is of some use to the judiciary in reaching sentencing decisions. In support of this belief, some psychiatrists would look no further than the fact that the court requested their evaluation. They would argue that psychiatrists, as citizens, have an obligation to support the justice system and should not ordinarily resist legitimate requests from the judiciary for psychiatric services. The courts apparently feel that psychiatrists have something to offer to the sentencing process. However uncertain psychiatrists may be as to the relevance of their expertise and the uses to which it might be put, according to this position, it is ultimately for the courts to determine the utility of psychiatric participation. It would be arrogant of psychiatrists, and neglectful of their social responsibilities, for them to summarily reject what the courts view as a legitimate demand for service.

Although this argument has a certain validity in a society, such as ours, that depends upon the participation of all members for the effective functioning of its basic institutions, it probably represents too superficial an approach to the issue. To ask psychiatrists blindly to accept the mandates of the courts in all circumstances is to ask them to ignore their duty to exercise independent moral judgment concerning the legitimate use of their skills. This abdication raises the spectre, in the long run, of psychiatry functioning, in some cases,

solely as an arm of the state, as it does in the Soviet Union today. (21)

Perhaps the most productive way to approach this issue is to inquire into the specific benefits that are likely to result from the participation of psychiatrists in the sentencing process. Viewing sentencing in terms of the customary functions of the criminal justice system - retribution, deterrence, restraint, and rehabilitation - it is evident that the sentencing agency may find psychological variables to be relevant to each purpose. Decisions regarding retribution, for example, have been influenced traditionally by the mental state of the offender at the time of the crime. This is true whether retribution is viewed in terms of just deserts, in terms of its educative function, or in terms of its usefulness in preempting private vengeance. If we ever move towards a more victim-oriented approach to retribution, the courts will also need to know a great deal about the psychological relationship between victim and offender and the psychological needs of both (22).

In considering deterrence, the psychological status of the offender may be important in determining the likely effectiveness of specific deterrence and may have a remote relationship to the efficacy of general deterrence, as well. It should be noted that there is continued controversy as to the extent to which the punishment of either normal or abnormal offenders deters other citizens (23). In addition, it is unclear how much psychiatrists have to contribute to efforts to predict the outcome of deterrent measures.

Discussions as to the degree and duration of restraint may be more rational if they, too, are based in part on psychological assessments of the offender's capacity to harm. While psychiatric testimony would seem desirable here, the poor performance of psychiatrists as predictors of long-term violence severely limits its utility. Discussions of rehabilitation, at least for those offenders with treatable mental conditions, may also benefit from psychiatric input.

To whatever extent sentencing is individualized, the courts will have

an even greater need for psychiatric and psychological information. Even when a clearly defined mental illness does not exist, psychiatric theories of personality and development may still provide the court with useful insights as to the mental processes of the individual offender. In summary, psychiatric participation in the sentencing process may serve a variety of important societal needs.

While psychiatrists may therefore be justified in participating in sentencing (within the framework we describe below), in no sense can it be said that an individual psychiatrist is obligated to do so. There may be a variety of legitimate reasons that would lead psychiatrists to decline to take part in the sentencing process. It is likely that psychiatrists will be especially concerned over the following three issues:

1. When prolonged loss of liberty or of life are at issue, psychiatrists may feel that the evaluative skills that adequately serve them in other contexts are not sufficiently reliable. Opinions are more freely stated when they do not elicit profound consequences.

2. Specifically concerning capital sentencing, the greater procedural structure and the increased vigor with which lawyers address the issues may make the process more adversarial than it is in non-capital cases. Psychiatrists who believe that their participation is most useful if non-adversarial in nature, therefore, may find capital sentencing proceedings especially unattractive. It is likely that many psychiatrists who once argued for a greater role in the sentencing process envisioned a structure in which they would report to the judge or actually be part of a sentencing tribunal. They probably did not anticipate a role that called for them to act as expert witnesses, subject, as are psychiatrists who participate in insanity hearings, to vigorous cross-examination. Most psychiatrists do not welcome court experiences. Those who have always avoided courtrooms out of fear or

principle have not been heartened by the new structure.

3. Unlike the traditional unstructured sentencing process, capital and presumptive sentencing - because of the statutory schemes - tend to focus attention on particular issues, such as the risk posed by the defendant of future violence and the defendant's ability to have "controlled" his conduct at the time of the crime. As a result, it may be more difficult for psychiatrists simply to offer whatever general insights they have concerning the defendant's makeup. Those psychiatrists who, in the past, favored participation in sentencing rather than insanity proceedings often took this position because sentencing proceedings permitted them to testify without the restraint of responding to a specific standard. Current trends in capital and presumptive sentencing may present psychiatrists of such orientation with a less attractive task than that posed by traditional sentencing.

For all of these reasons, the psychiatrist may legitimately decline to aid the court in criminal sentencing.

Terms of Involvement

A psychiatrist who is willing in general to participate in the sentencing process may nevertheless conclude that participation is ethically unacceptable under certain circumstances. For example, a psychiatrist may decide that certain conditions preclude an objective search for truth with sufficient opportunity to abide by the principles of non- maleficence and beneficence. The psychiatrist must consider this in advance of participation and seek assurances that what he or she regards as the ethically mandated conditions will be present.

Certain types of ethical problems may be minimized when the psychiatrist is involved as a "friend of the court." In this role, the psychiatrist is

employed by the court to conduct an evaluation. The results of the evaluation are embodied in a single product -- usually a report -- that is presented to the court and, either directly or through the court, to both sides. The psychiatrist is then available for further participation, as in the form of testimony, upon request of the court itself or either side. This mode of involvement, the mode traditionally favored by most psychiatrists, does not place the psychiatrist in an adversary role. No possible commitments to either side in the litigation should impinge upon the psychiatrist's ability to express his or her full and honest opinion on the issues and, in the course of the process, to pursue an individual-oriented approach to performing the evaluation. In such a position the psychiatrist must, of course, scrupulously seek to avoid bias simply because his or her report is unlikely to be challenged and may have an especially powerful influence.

Greater problems are probably presented when the psychiatrist is asked to participate in sentencing on behalf of either the defense or the prosecution. Defense counsel, for example, may seek a psychiatric evaluation of the defendant conditioned upon the psychiatrist's agreement to regard the evaluation and its results as confidential if the psychiatrist's results are not favorable to the defense. It can be argued in support of this practice that the ability to explore the possibility of psychiatric testimony in mitigation of penalty without the danger of creating evidence favorable to the prosecution is an inherent part of a defendant's constitutional right to effective defense representation. Further, the information obtained by a psychiatrist who evaluates a defendant under these conditions may be covered by the attorney-client privilege and thus the psychiatrist can not be compelled to disclose this information. The privilege does not always, however, cover such information in some jurisdictions, and even where the privilege applies,

it may be waived if the defense introduces other evidence bearing upon the defendant's psychiatric status. In any case, to the extent that a psychiatrist fails to make available to the prosecution (or is legally prevented from so doing) information that suggests the appropriateness of a more severe penalty, the psychiatrist fails fully to pursue the quest for truth. Some psychiatrists may find this limitation ethically unacceptable.

On the other hand, similar problems may arise for psychiatrists employed by the prosecution. Thus a psychiatrist might agree to evaluate a defendant and to disclose the results only to the prosecution, with that party having the option of whether or not to use the information. To the extent that involvement under such an arrangement results in the court failing to consider information tending to suggest a less severe penalty, both the quest for truth and the principles of non-maleficence and beneficence are sacrificed. Moreover, withholding such information is most likely in violation of a criminal defendant's due process right to have the prosecution disclose "mitigating" evidence (24).

A variation on this problem arises when the psychiatrist is hired by either side for the purpose of conducting a limited examination that would address a particular question. The attorney defending a convicted rapist, for example, may be interested in knowing whether his client, who would otherwise be sent to an institution for dangerous sex offenders, might be treated successfully in a private hospital. Although this type of inquiry is certainly legitimate, the likelihood is small that the psychiatrist will be able to conduct an examination that will yield data relevant to this question alone. Before agreeing to provide a limited opinion, therefore, the psychiatrist should be aware of the possibility that other data relevant to the sentencing proceeding may be uncovered (e.g., that the subject has

committed several previous offenses that remain unknown to the legal authorities). As with examinations to which the other side will not have access, arguments can be made both for and against participation under these circumstances. The potential ethical problems inherent in accepting such limited assignments, however, suggest that they should be accepted, if at all, only after having given careful consideration to these issues.

On balance, the Task Force believes that involvement in the "friend of the court" role creates fewer ethical conflicts for the psychiatrist. However, a defendant's legitimate interest in effective representation and society's interest in maximally informed sentencing can be viewed by a psychiatrist as sufficiently important to justify accepting employment by either the prosecution or the defense team. Any psychiatrist who decides to accept such involvement clearly has a duty to explore carefully, before participating, the limits, if any, on disclosure of the information. The Task Force recognizes that a psychiatrist could quite properly regard his or her ethical responsibility to pursue the truth as too greatly compromised by certain limitations on disclosure. Thus, such participation might reasonably be regarded as ethically unacceptable.

Regardless of who employs the psychiatrist, however, certain ethical mandates are unvarying. Pressure may be applied by attorneys for either side for information unfavorable to their case to be omitted from the psychiatrist's report. If the psychiatrist deems such information relevant to the sentencing process, these demands must be resisted and a complete and accurate report constructed. Again, explicit agreement to this condition in advance of participation is the best means of ensuring against later difficulties.

Clarifying the Purpose of the Examination

Assuming that the psychiatrist does agree to conduct an examination

for sentencing purposes, his or her first step must be to clarify with the party requesting the assessment precisely the sort of information that is desired. In presumptive sentencing jurisdictions, or in capital cases, the psychiatrist should become familiar with the controlling statute, and with any relevant case law or legal commentary. When clear guidelines do not exist, as in most jurisdictions with nonpresumptive sentencing, the psychiatrist will still want to find out why the requesting party desires the examination and what areas he or she believes are most relevant to the sentencing process. For example, in a case involving child abuse, the referring defense attorney may be aware that the judge is particularly interested in the defendant's own experiences of being beaten as a child. This information should aid in providing a focus for the examination.

In addition to assisting the psychiatrist in conducting the examination, this focus provides some protection for the subject. Not only does it thereby become probable that the information most likely to benefit the defendant will be revealed, but extraneous material which, although interesting from a psychological perspective, is irrelevant to the sentencing process, will not be exposed to public scrutiny. Thus, even in a context in which the usual guarantees of confidentiality are inapplicable, the subject's privacy is protected to some extent.

CONDUCTING THE EVALUATION

Obtaining Informed Consent

If any harm accrues as a result of the pre-sentencing examination, it is most likely to occur when the defendant mistakes the nature and purpose of the assessment. The natural assumption of many people when they are "examined" by a psychiatrist is the the examiner's sole interest is to be of help to them - the traditional medical model. In the sentencing context, in which an

important part of the psychiatrist's function is to meet societal needs, that assumption may lead subjects to reveal information that they would not otherwise disclose. The subsequent discovery of the non-therapeutic nature of the encounter may cause defendants to feel their trust has been violated, or if sensitive information becomes general knowledge through the psychiatrist's report, to suffer embarrassment and perhaps the loss of support from friends or family members.

A more concrete form of harm, of course, may result from subjects revealing information that leads judges to order harsher sentences than they had previously been inclined to impose. The obligations of the psychiatrist are problematic here. By virtue of accepting the charge to perform the examination, the psychiatrist incurs the obligation to the court (and indirectly to society as a whole) to conduct the most complete and thorough examination possible. On the other hand, efforts at deception, or exploitation of the subject's ignorance or misunderstanding, in order to encourage the subject to disclose damaging data are clearly unethical.

Both these dilemmas can be resolved in part by a reliance on the doctrine of informed consent. Defendants' right to privacy and their right to withhold potentially incriminating information can both be vindicated by scrupulously informing them of the nature and purpose of the examination. This should include an explanation that the psychiatrist is not functioning in a traditional medical role, but is serving as an agent of the court (or of the defense or prosecution) for the purpose of gathering data that may be relevant to the sentencing decision. The circumstances under which information divulged during the evaluation may be disclosed to the prosecution or the court should be made explicit. Finally, psychiatrists should explain, as best they can, how the defendant may be helped or harmed by the information

in the report. This may include a brief description of the applicable law. (Although the defendant's attorney should already have conveyed this information, the psychiatrist should not assume that this has occurred.) If subjects are unclear about any of this, and matters are not clarified after they have been given an opportunity to ask questions, the examination should be postponed until they have had a chance to discuss the matter with their attorney. When it appears that the defendant is incompetent to give informed consent, the psychiatrist should stop the examination, inform the party who requested the evaluation of the defendant's condition, and allow the legal system to arrive at a solution to the problem. It should be noted that the law is unclear as to whether a substituted consent is permissible in such circumstances, and if it is, who is authorized to provide it. In no case should the examination take place without the knowledge of the defense attorney.

Obtaining informed consent does not eliminate the possibility that defendants will reveal embarrassing material or information that may later affect them adversely. But all competent adults have the right to take risks, including the risk that information they disclose may affect them in unanticipated ways. The psychiatrist's obligation extends only to ensuring that subjects understand as clearly as possible the potential risks involved in such disclosures.

The Scope of the Evaluation

Psychiatric examination of defendants for purposes of sentencing should be as complete as possible. The quest for thoroughness serves several ends: the court is most likely to obtain the information it desires; the possibility that information will be revealed that may aid the subject in the sentencing process is maximized; and the chance that an inaccurate, and potentially

harmful impression will be formulated is minimized. Yet, merely to speak of completeness in a context in which the time available for the examination is often quite limited does not offer the examining psychiatrist much assistance in defining the scope of the examination.

As a general rule, this Task Force believes that every pre-sentencing examination should include a complete psychiatric history (including the details of the subject's mental state at the time of the offense in question, the defendant's subsequent functioning, past history, family history, social history, and medical history) and a complete mental status examination. To provide a more concrete guide, the examination should be equally as thorough as that employed when a previously unknown patient arrives at a psychiatric facility requesting evaluation and treatment.

The examination should not be limited to the defendant alone. All past records that may be relevant should be obtained and/or previous therapists and caretakers contacted directly. (This must necessarily proceed only with the subject's consent, except for records from the correctional system, which may be made available without the subject's consent.) If contact with a member of the family or a friend would aid in the interpretation of the material obtained from the subject, such contacts should be pursued. Police reports and transcripts from the trial may help to shed light on other's perceptions of the subject's behavior at the time of the crime.

If there is any indication that medical or neurologic factors may have played a role in the subject's behavior, the appropriate studies should be performed. This may include a physical examination, neurologic examination, neuropsychological testing, EEG, CT scan, or skull films. It may, of course, given limitations of time and facilities available, be impossible to obtain some of these tests. If so, the psychiatrist's report should note the omissions

and clearly qualify the conclusions as tentative. In some cases it may be impossible to reach any conclusions without the additional data; if so, this should be stated.

The U. S. Supreme Court, in its decisions on the death sentence, appears /to have acknowledged even greater need for care in capital cases - what has been called "super due process." (25) On ethical grounds alone, the magnitude of the harm to the subject from incorrect conclusions would seem to justify a "super" level of care in psychiatric assessments, too, when the death sentence may be invoked. This does not necessarily mean that every even remotely relevant test should be ordered - for example, a CT scan for all defendants on the theory that an organic cause for their behavior may be discovered. But, the responsibility does devolve on the psychiatrist not to overlook any element of the examination that may be directly relevant when a life is at stake.

There will be circumstances in which it will be clear from the moment that the psychiatrist is asked to perform the examination that neither the requisite time nor facilities to conduct an adequate assessment will be available. In such cases, the psychiatrist may be justified in refusing to participate at all. On the other hand, we recognize that in such instances psychiatrists may believe that even their limited examinations may uncover information of use to the defendant. Participation under such circumstances may be appropriate as long as the limitations of the findings are clearly stressed in the final report.

The Use of Empathy

Concern has been expressed that the empathic skills of psychiatrists may be employed to extract information that defendants would not ordinarily reveal. In part, this concern derives from a misconception of psychiatrists

as "human lie detectors," able to penetrate the most resistant mind. There is, however, some realistic basis for concern. The use of empathic techniques and the tools of clarification and interpretation may lower a subject's usual defenses. It is difficult to provide guidelines to regulate such behavior, however, because in many cases these techniques represent the essence of the psychiatric examination. In addition, empathic statements may be necessary to prevent the subject from suffering harm as a result of discussing psychologically distressing topics. What can be said is that the psychiatrist should stop the examination whenever it appears that the subject is confused about the purpose of the encounter. A subject who appears to be slipping into a "therapeutic" mindset should be reminded of the non-therapeutic intent of the assessment before the examination proceeds further. One must inevitably rely on the judgment of the individual psychiatrist in this area.

REPORTS AND TESTIMONY

The results of the pre-sentencing examination may be communicated to the court in a written report or, particularly in capital cases, by means of personal testimony. In either case, similar principles are applicable.

Reporting the Results of the Examination

When the psychiatrist controls the format of the presentation of the data, as in a written report, the results should be reported as completely and accurately as possible. The usual format of a psychiatric history may be followed, but for the convenience of the court and the attorneys, the presentation of the history should be preceded by a brief summary of the conclusions. This will enable individuals who are inexperienced at reading psychiatric records to focus their attention on the relevant data. Particular emphasis should be given in the body of the report to reporting data that will later be used to justify the conclusions.

When statutory guidelines control the sentencing process, as in presumptive sentencing, the focus of the conclusions of the report will be obvious. In other cases, particularly when the person requesting the assessment has provided little indication of what information is desired, the clinician may be somewhat at a loss to determine what to include. At a minimum, the report's conclusions should attempt to explain the possible influences of psychiatric variables on the offender's criminal behavior. This should incorporate psychological, psychosocial, and biological factors, where relevant. Environmental circumstances at the time of the crime should also be included. Special emphasis should be placed on the relationship of past or present mental illness to the criminal event.

Limitations on Psychiatric Expertise

If the clinical findings of the examination are to be properly used, and if the mandate of the court is to be fulfilled, psychiatrists must clearly state the limitations of their conclusions. These limitations may result from deficiencies in the examination (as discussed earlier) or from the current state of psychiatric or medical knowledge about particular issues. For example, psychiatrists are severely limited in their capacity to predict violence or to describe mechanisms by which certain character disorders or psychotic syndromes influence moral judgments. If the court desires information on these, it must be told as clearly as possible that the data here is either sparse or non-existent.

It may be relatively easy to note the limitations on psychiatric expertise in a written report. Oral testimony in an adversary process presents more complex problems. The testifying psychiatrist is ordinarily restricted to responding to direct questions from the opposing attorneys.

There may be no chance to interject the necessary qualifications, or to prevent one side or the other from distorting the meaning of the remarks. Although regrettable, there may be little that the psychiatrist can do in such situations beyond making every possible effort to clarify the limits of the data; judges will frequently permit an expert who requests the opportunity to explain a position to do so. There may be other steps, however, that a psychiatrist can take before arriving in court to prevent distortion of his or her remarks. If the psychiatrist participates in the case at the request of the attorney for either side, it may be possible to condition participation on that lawyer's agreement to abstain from problematic questions, claims of unwarranted expertise for the psychiatrist, or unjustified inferences from the psychiatrist's testimony. Of course, should the lawyer fail to honor the agreement in the courtroom, there is little that the psychiatrist can do in response. The psychiatrist's ethical responsibility can go no further.

Testimony on "Ultimate" Issues

There is a longstanding dispute in forensic psychiatry as to whether psychiatrists should frame their conclusions in terms of the legal standard involved in the particular proceeding. On the one hand, some forensic psychiatrists believe that it is most useful to the court to frame the conclusions in terms that lawyers and judges will most readily understand. On the other hand, opponents of conclusory terminology in psychiatric reports or testimony are concerned about the possible usurpation of the fact-finding role of the court. According to this view, it is up to the judge or jury to decide whether an individual may be dangerous in the future, or whether mitigating circumstances were in fact present. For the psychiatrist to express an opinion on these matters short-circuits the legal process and

denies the defendant his rights to due process. Advocates of non-conclusory testimony argue that to avoid these problems the defendant's behavior, mental state, and psychiatric examination should be described in psychiatric, medical or lay terminology while the use of legal terms is eschewed.

All commentators agree that the expert should avoid using legal terms (such as "responsible" or "dangerous" or "insane") which require value judgments and have no demonstrable clinical content. The question being debated is whether the expert should state his conclusions in terms of the ultimate issue on a narrower range of issues which are "mixed questions of fact and law." Some legal terminology may be clinically meaningful even though the legal meaning will ultimately be determined by the judge or jury. Examples include "appreciation of wrongfulness," "extreme mental or emotional disturbance," "amenable to treatment," etc. In such contexts, it is imperative to support all conclusory statements with full data and clarification of any psychiatric or legal terms that are used so that the court is certain to understand what the psychiatrist means and understands.

If the psychiatric witness is unable to adequately answer a question asked by an attorney, such as a prediction of "future dangerousness," it is quite acceptable to refuse to answer questions of that sort by stating that the prediction of long-term future dangerousness is not within the proper scope of psychiatric expertise and that one's knowledge and experience does not permit one to clearly say that someone will continue to be a danger to the community in the distant future, etc. On the other hand, if the psychiatrist believes that he or she has sufficient data to make some type of probability prediction, he or she should offer an opinion only if the basis for such a prediction is fully explained.

Recommendations for Treatment

Courts are often uninterested in psychiatric diagnoses and recommendations for treatment. On the other hand, many courts have ordered pre-sentencing assessments precisely because of their interest in these issues. It may be unclear whether such information belongs in the psychiatric report. This Task Force believes that it does. The pre-sentencing examination may be as far removed from the therapeutic setting as any imaginable, but the psychiatrist's obligation to be of benefit to the subject of the examination is still present. Whether or not the court will make use of the information, the psychiatrist ought always to include a comment on diagnosis (or lack of diagnosis, if none is appropriate) and a recommendation for treatment, if needed. Even if the judge settles on a penal disposition, this information may be of use in the prison setting by calling attention to the special needs of the subject for psychiatric care.

Recommendations for Disposition

Psychiatrists can be of substantial help in the sentencing process, consistent with their ethical obligations, when they apply appropriate data to a consideration of the likely outcomes of alternative dispositions. The data on which the psychiatrist's conclusions are based should be incorporated in the report. Thus, pointing to the repeated failure of probation combined with a certain type of outpatient psychiatric treatment for a sex offender, the psychiatrist might reasonably note to the court that a similar disposition is unlikely to yield the desired result.

The Task Force, however, discourages the practice of offering specific recommendations for disposition, including probation and incarceration. The decision as to whether or not to incarcerate an individual ought to reflect

societal needs that go well beyond the psychiatrist's expertise. Judges and juries, as the designated agents of society, should be the ones who reconcile the needs of the defendant with the needs of society for protection and the capacities of the penal system.

A psychiatric recommendation of incarceration is particularly objectionable in light of the basic individual-centered orientation we propose; it would represent a clear-cut violation of the principle of non-maleficence. Evidence that courts are likely to concur with psychiatric recommendations for punishment, at the same time that they discount suggestions for leniency, reinforces the desirability of avoiding any recommendation on whether or not the defendant should be incarcerated. (26)

Commenting on Dangerousness

Many of the statutory schemes, particularly those controlling capital sentencing, call for an investigation of the defendant's future dangerousness. This often serves as the focus of the psychiatric examination. We have previously noted the limitations of predicting violence. Considerable evidence has been accumulated by now to demonstrate that long-term prediction by psychiatrists of future violence is an extremely inaccurate process. The most that can be said about any individual is that a history of past violence increases the probability that future violence will occur. (27) In addition, the psychiatrist may wish to comment on factors in the individual's environment that are likely to increase (e.g., alcohol, rejection by a girlfriend) or decrease (e.g., taking psychotropic medication) the probability of future violence.

The Use of the Diagnosis of Sociopathy

An important issue of reporting that must be addressed is testimony

that deals with the diagnosis of antisocial personality disorder, psychopathy or sociopathy. There is still much confusion in describing and labeling this disorder. Many psychiatrists use terms such as sociopathy or psychopathy interchangeably with the DSM-III term antisocial personality disorder. The literature supports this confusion. Some concepts of sociopathy imply basic defects in an individual's capacity to feel guilt. The major diagnostic factor here is at least in part also an explanation of the individual's behavior. The DSM-III classification (antisocial personality disorder) rejects an explanatory approach and is primarily a comprehensive description of a pattern of behavior that fits a large number of habitual criminals. Some of the research which has been done on individuals labeled sociopathic, antisocial personality disorders, or habitual criminals may be generalized and applied to all three categories. In this area confusion reigns. The psychiatrist who is not careful can mislead the judge or jury into believeing that a person has a major mental disease simply on the basis of a description of prior criminal behavior. Or a psychiatrist can mislead the court into believing that an individual is devoid of conscience on the basis of a description of criminal acts alone. All that is required is to take data derived from one concept or definition of a disorder and apply it to another.

The profession of psychiatry has a responsibility to avoid inflicting this confusion upon the courts and to spare the defendant the harm that may result. If the psychiatrist uses a term such as sociopathy or antisocial personality disorder, that term should be defined precisely. The psychiatrist must be able to explore the kind of thinking that has gone into the change in terminology over the years and must acknowledge the tenuous nature of the

concept. Given our uncertainty about the implications of the finding, the diagnosis of sociopathy or antisocial personality disorder should not be used to justify or to support predictions of future conduct. There is no certainty in this area. (28) Adding the pejorative term "sociopathy" to the predictive equation without substantial explanation obfuscates the issue.

Use of Information Gathered in Other Contexts

The recent U. S. Supreme Court ruling in Smith v. Estelle (1) should effectively preclude the practice of using information gathered for other purposes at the sentencing state. The court ruled that the state may not use information obtained during a psychiatric examination as part of its case-in-aggravation against the defendant at a capital sentencing proceeding (and by implication, as part of its proof of the elements of the crime at the guilt state) unless the defendant has had an opportunity to consult with his attorney and has been told about the purpose of the examination and given a chance to refuse to participate. This decision provides judicial support, albeit on constitutional rather than ethical grounds, for the function of informed consent in pre-sentencing examinations we have advocated above.

We might note that there are also sound clinical and ethical reasons for avoiding the use of data accumulated for some other purpose (as in pretrial competency or criminal responsibility examinations). As noted above, to avoid unnecessary harm to the subject, especially in capital cases, as well as to fulfill the mandate of the court, the psychiatrist must ensure that the information elicited is as complete and accurate as possible. Interviews conducted for other purposes will inevitably turn the psychiatrist's attention toward different issues than will pre-sentencing examinations.

Applying for sentencing purposes the information collected earlier, therefore, will result in a substantially less accurate assessment than when an examination is performed for the specific purpose of eliciting information relevant to sentencing issues. Even had the Supreme Court not acted, psychiatrists themselves would have had ample reason to shun the practice used in Smith.

Testifying Without Examining the Defendant

Because defendants who do not themselves intend to use psychiatric testimony at the hearing stage cannot be compelled to submit to a psychiatric examination, prosecutors are frequently in the position of being unable to obtain assessments they desire. Some prosecutors have therefore asked psychiatrists to testify about a defendant (frequently about the problem of future dangerousness) without having examined the defendant. In such cases, the psychiatrist may have access to the defendant's records, may have been able to interview acquaintances of the defendant, or may have had the opportunity to observe the defendant in court.

If results of examinations conducted for other purposes are to be excluded from introduction at sentencing hearings because of a concern with their accuracy for the purpose at hand, there is all the more reason to shun the practice of testifying without having examined the defendant at all. A recent court decision in Texas, where this practice apparently has been common, concluded that a psychiatric opinion concerning a defendant's dangerousness formed without a personal examination of the defendant, but on the basis of police reports, conversations with third persons, and other information of unestablished reliability, was not admissible evidence. (29) The Task Force agrees that, as a matter of professional ethics, a conclusion based

on such data is insufficiently grounded to be offered properly as an expert opinion on any issue in a criminal case, including those which arise at sentencing.

A variation on this practice is for the psychiatrist to be asked to respond to "hypothetical" questions at a sentencing hearing. The prosecutor using this technique might detail the defendant's history and then ask the psychiatrist to comment on a "hypothetical" person who displayed these traits. Often here, too, dangerousness is the focus of the assessment. Needless to say, responding to hypotheticals is just as fraught with the possibility of error as testifying in any other way about an individual whom one has not personally examined.

LEGAL PROBLEMS

There are a number of problems that arise in the conduct and reporting of pre-sentencing assessments that are beyond the power of psychiatrists to correct. They are mentioned here for the purpose of alerting both the psychiatric and the legal professions to the need for change.

Time Available for Pre-Sentencing Examinations

Ironically, pre-sentencing assessments in capital cases are often conducted under extreme pressures of time, while in non-capital cases they may proceed at a leisurely pace. This paradoxical situation, given the need noted earlier for even greater care in capital cases, has come about because capital sentencing is frequently decided at the second stage of a bifurcated trial. After determining guilt, the same jury may be called upon, after the lapse of only a few days, to determine the appropriate punishment for the crime. Since the jury cannot be detained indefinitely, pre-sentencing assessments must often be made in a day or two's time. This raises severe difficulties

in carrying out the kind of assessment we described earlier, with its emphasis on completeness and validity.

The best solution to this problem lies in the hands of those who write capital sentencing laws. An appropriate time period must be permitted following conviction for the assessment to take place if psychiatric input is desired at all. This may mean impaneling a second jury or leaving the sentencing decision to the judge in the case. Another solution would be to require both the prosecution and defense to conduct their pre-sentencing examinations prior to conviction in cases in which the death penalty will be sought. For such examinations to be possible, complete confidentiality of material revealed by the defendant would have to be guaranteed, unless and until the defendant were found guilty. Although advance pre-sentencing examinations eliminate time pressures, they present other liabilities. Defendants who intend to deny their guilt in court may find it difficult to anticipate the sentencing phase and, assuming they did commit the crime in question, to talk openly about the circumstances surrounding their acts. Defense lawyers, too, may be reticent to participate constructively in a process that appears to presage the futility of their defense. Nevertheless, this process represents one possible means of avoiding the usual constraints of time. As noted in the section on the conduct of the examination, an inadequate time period for the assessment may legitimately lead a psychiatrist to refuse to participate in the process.

Use of Defense Experts's Information by the Prosecution

In some jurisdictions there is ambiguity concerning the prosecution's ability to use information the defense develops during its preparation for trial or sentencing. It is possible, therefore, for results obtained in an

interview with a psychiatrist hired by the defense to be used ultimately by the prosecution. Since defendants may respond to the interview quite differently depending on whether they view the psychiatrist as working "for" or "against" them, the inability to dichotomize the issue quite so neatly should be pointed out to the defendant as part of the informed consent process. The psychiatrist should make certain that the risk is understood and that the defendant has expressed a willingness to proceed in spite of the risk. Because the ability of the prosecution to obtain information generated by the defense may lead to an impairment of the defense's desire or ability to accumulate relevant psychiatric information, statutory protection of the defense's evaluation should be afforded in such cases.

The Availability of Psychiatric Pre-Sentencing Evaluations for Indigents

In many jurisdictions, funds are not routinely made available to indigents to hire independent psychiatrists for pre-sentencing examinations. Public facilities may not be adequately staffed or experienced to meet defendants' needs in this area. If psychiatrists are perceived to have something to offer in the sentencing process, the potential benefits of their participation should not be restricted only to those wealthy enough to afford them on a private basis. The Task Force encourages attention to the current inequities in the use of psychiatry for sentencing purposes and urges that appropriate measures be taken to correct them.

CONCLUSIONS

The ethical issues for psychiatrists who participate in the sentencing process are manifold and complex, but the problems that they present do not appear to be insurmountable. The key to managing them, in the view of this

Task Force, is for the psychiatrist to strive to maintain an individual-centered orientation while performing this societal-centered task. This means, whenever possible, both trying to avoid harm to the subjects of the assessment and acting in ways that are likely to benefit them. We are under no illusions as to the difficulty of accomplishing this task, but we are convinced that the advantages that are likely to result are well worth the effort.

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January 11, 1983

Will Gray, Esq.
2038 Lexington
Houston, Texas 77098

Re: Barefoot v. Estelle

Dear Mr. Gray:

I am writing to confirm that, subject to formal approval, it is the intention to the American Psychiatric Association to file a brief amicus curiae in the 5th Circuit in the above-captioned case on the issue of the reliability of psychiatric testimony concerning long-term probable future dangerousness when such testimony is based solely on hypothetical questions.

Sincerely,

Joseph N. Onek
Attorney for the American
Psychiatric Association

JNO:rm

Exhibit "H"

CLERK U.S. DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
FILED
DEC 30 1982
JESSE E. CLARK, CLERK
BY DEPUTY: D Ferguson

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LARRY WAYNE WHITE,
Petitioner

V.

W. J. ESTELLE, JR., DIRECTOR,
TEXAS DEPARTMENT OF
CORRECTIONS,
Respondent

CIVIL ACTION NO. H-81-1661

FINAL JUDGMENT

In accordance with this Court's Memorandum and Order filed on this date, and for the reasons stated therein,

It is ORDERED, ADJUDGED, and DECREED that the petition of Larry Wayne White for a writ of habeas corpus be, and the same is hereby, GRANTED.

The Clerk will send copies of this Final Judgment to petitioner and the Attorney General of Texas.

DONE at Houston, Texas this 30th day of December, 1982.

UNITED STATES DISTRICT JUDGE

"I"

CLERK U.S. DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
FILED
DEC 30 1982
JESSE E. CLARK, CLERK
BY DEPUTY: J. Ferguson

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LARRY WAYNE WHITE, Petitioner	§	
V.	§	CIVIL ACTION NO. H-81-1661
W. J. ESTELLE, JR., DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, Respondent	§	

MEMORANDUM AND ORDER

I. HISTORY OF THE CASE

On June 20, 1979, Larry Wayne White was convicted of capitol murder in the 185th Judicial District Court of Harris County, Texas for the March 1, 1977 murder of Elizabeth St. John, a seventy-two-year-old woman.[1/] The evidence showed that during the course of a robbery, the victim had been strangled, stabbed in the back with a screw driver, and sexually violated, either before or after her death. After his arrest in Myrtle Beach, South Carolina, and while in custody, petitioner confessed to the offense. The court appointed two attorneys to defend. Following a court order, petitioner underwent a pretrial psychiatric examination to determine his competency to stand trial.[2/] White was not advised of his right to remain silent during this examination, nor forewarned that anything he said could be used against him at trial.

At the sentencing phase of the trial, the state produced evidence to show that White recently had been convicted of the murder of an eighty-year-old woman, had previously raped and beaten a ninety-two-year-old woman, and had a record for forgery, resisting arrest, and assault and battery. The state called as witnesses a psychiatrist, Dr. John David Nottingham, Jr. and a psychologist, Dr. Jerome Brown. In answer to hypothetical questions, these doctors testified that a person with Larry Wayne White's criminal past would be likely to commit future acts of violence. Petitioner testified on his own behalf; he attributed his violent behavior to his experiences as a Marine in Vietnam and to a problem with alcohol. On the basis of the evidence presented, the jury affirmatively answered the three special issue questions of article 37.071(b) of the Texas Code of Criminal Procedure,[3/] and Larry Wayne White was sentenced to death. The execution date was set for July 1, 1981.

Petitioner exhausted his state remedies as required by 28 U.S.C. § 2254[4/] and on a writ of habeas corpus to this court, raised those claims of constitutional violations which had been unsuccessfully pursued in the state courts. On June 29, 1981, this court granted petitioner's motion for a stay of execution pending resolution of the claims raised in the writ. Thereafter, a hearing was held on the issue of the constitutionality of the admittance of the psychiatric testimony used at the punishment phase of Larry Wayne White's trial.

II. ISSUES RAISED IN THE WRIT OF HABEAS CORPUS

Petitioner raises seven claims for relief based on alleged violations of petitioner's constitutional rights. These are:

1. The testimony of a court-appointed psychiatrist and psychologist was admitted at the punishment phase of petitioner's trial in violation of petitioner's rights under the fifth, sixth, and fourteenth amendments. 5/

2. Petitioner's confession, obtained by police in violation of those rights secured by the fifth, sixth, and fourteenth amendments, was admitted at petitioner's trial.

3. The ineffectiveness of court-appointed appellate counsel denied petitioner a meaningful appeal and, thus, abridged petitioner's rights under the fifth, sixth, eighth, and fourteenth amendments.

4. Prospective jurors who expressed reservations regarding the assessment of the death penalty were systematically excluded from the jury. Thus, petitioner's sixth, eighth, and fourteenth amendment rights were denied.

5. Texas capital sentencing procedures, as applied to petitioner's case, violate the sixth, eighth, and fourteenth amendments.

6. Petitioner's fifth and fourteenth amendment privilege against compulsory self-incrimination was abridged when he was extensively cross-examined regarding the instant offense at the punishment phase of his trial.

7. Petitioner was denied effective assistance of counsel at trial in violation of the sixth and fourteenth amendments.

After consideration of the evidence and arguments advanced by the state and petitioner, this court has determined that the admission of the psychiatric testimony of Drs. Nottingham and Brown at the sentencing phase of Larry Wayne White's trial violated petitioner's constitutional rights to due process. Consequently, it is incumbent upon this court to grant the writ for habeas corpus relief.[6/] The Supreme Court has held, that the death penalty may only be imposed after a fair presentation of all the available evidence. Smith v. Estelle, 445 F. Supp. 647, 654 (N.D. Tex. 1977); see Gardner v. Florida, 430 U.S. 349, 357-58 (1977); Gregg v. Georgia, 428 U.S. 153, 190-195 (1976); see generally Furman v. Georgia, 408 U.S. 238, 1972. A proceeding during which the defendant's due process rights are denied is a priori unfair. Gardner v. Florida 430 U.S. at 358 (fairness of the sentencing procedure is measured by the due process clause.) Hence, petitioner's death sentence must be vacated.[7/]

III. THE PSYCHIATRIC TESTIMONY

Dr. Nottingham, Jr., a psychiatrist employed by the Harris County Psychiatric Hospital in the Forensic Psychiatry Unit, and Dr. Brown, Chief Psychologist at the Forensic Psychiatry Units in Harris and Jefferson Counties, were called by the state to

testify at the penalty phase of petitioner's trial. Pursuant to court order, both doctors had previously interviewed White to determine his competency to stand trial. It is again important to point out that White was not advised of his right to remain silent either before or after the psychiatric examination.[8/] The fact that the doctors had had prior contact with petitioner was made clear to the jury. Each doctor was asked his opinion regarding petitioner's propensity to commit further acts of violence. The questions were structured as hypotheticals, but incorporated White's specific criminal history, with which the jury was familiar. Dr. Nottingham was asked the following question:

> Assume with me that a defendant named Larry Wayne White was on trial for a capital murder and had been found guilty of that capital murder and it was shown in the evidence -- and you're assuming with me that the evidence is correct -- that he was convicted in 1972 of assault and battery; convicted in '73 of assault and battery; convicted again in '73 of resisting arrest; convicted of committing a first-degree murder in the State of Florida which occurred February 22nd, 1977; and then convicted in the case on trial of committing another capital murder in the State of Texas. What would be your professional opinion concerning the question which you are familiar with on probability?[9/]

Later Dr. Brown was asked:

> Assume with me, if you will, a set of facts wherein we would have a person on trial for capital murder and the evidence were to show in our hypothetical that that person had been convicted in December of '72 of assault and battery; in January of '73 of assault and battery; and February of '73 of resisting arrest; and then convicted of committing a capital murder of an

80-year old woman on February 22nd, 1977; and another capital murder of a 71-year old woman on March 2, 1977. Assuming that set of facts, what would be your professional opinion as to this second question, dealing with probability, in a capital murder case?[10]

Immediately after testifying that on the basis of the pretrial examination, he had found Larry Wayne White sane and competent to stand trial, Dr. Nottingham was called upon to describe a sociopathic personality to the jury and to testify as to the poor prognosis for treatment for those diagnosed with that disorder. Dr. Brown gave similar testimony. In addition, in response to direct questions Dr. Brown testified that petitioner was "hedonistic."

IV. DUE PROCESS AND THE PSYCHIATRIC TESTIMONY

A. THE FIFTH AMENDMENT

1. The Hypothetical Questions

Petitioner contends that, based on the recent ruling in Estelle v. Smith, 451 U.S. 454 (1981), the use of the psychiatric testimony violated his fifth and sixth amendment rights. Respondent argues that the use of hypothetical questions by the State, in exploring the issue of White's future dangerousness, distinguishes the instant case from Smith and removes it from the Smith ambit. As is obvious from the arguments of the parties, a decision as to whether petitioner was deprived of his constitutional rights hinges on a determination as to whether Smith is controlling precedent.

Smith involved facts similar to those of the case sub judice. The State of Texas sought the death penalty against Smith, who was indicted for capital murder. Following a court order, Smith underwent a pretrial psychiatric examination to ascertain his competency to stand trial. At the sentencing portion of defendant's trial, the psychiatrist, who had previously interviewed Smith, was called as a witness for the State. When asked about the likelihood of defendant perpetrating criminal acts in the future, Dr. Grigson testified that, based on information obtained at the competency exam, it was his opinion that the defendant was going to commit similar or the same criminal acts in the future if given the opportunity. The federal district court, on a writ of habeas corpus, vacated defendant's sentence. The Fifth Circuit affirmed. The Supreme Court, in an opinion by Chief Justice Burger, held that the use of Dr. Grigson's psychiatric testimony at defendant's sentencing hearing transgressed Smith's fifth and sixth amendment rights and vacated the sentence of death. In discussing the fifth amendment issue, the Court ruled that this amendment applies to the penalty phase of a trial as well as to the guilt phase. The Court said, "Just as the Fifth Amendment prevents a criminal defendant from being made 'the deluded instrument of his own conviction,' it protects him as well from being made the 'deluded instrument' of his own execution." Id. (citations omitted). The court reasoned

that the principles underlying Miranda v. Arizona, 384 U.S. 436 (1966), applied equally to court-ordered pretrial psychiatric examinations as well as to custodial interrogations. In each instance the goal of Miranda to counteract pressures on an individual in custody from ignorantly sacrificing his fifth amendment rights is implicated. Estelle v. Smith, 451 U.S. at 466. Defendant Smith had not been advised of his right to remain silent; nor had he been forewarned that any disclosures made during the mental evaluation could be used against him as evidence that, if convicted, he should be put to death. Therefore, he was unable to make a knowing and voluntary waiver of his right against self-incrimination. Only in the event that a defendant makes an informed and voluntary waiver, after adequate notice of the purpose and uses of the psychiatric interview, the Court ruled, may a criminal defendant's statements made during such an interview be used as the basis for psychiatric testimony at trial. Id. at 467-69. The Court stated:

> Volunteered statements are not barred by the Fifth Amendment, but under Miranda v. Arizona, supra we must conclude that, when faced while in custody with a court-ordered psychiatric inquiry, respondent's statements to Dr. Grigson were not "given freely and voluntarily without any compelling influences and, as such, could be used as the State did at the penalty phase only if respondent had been apprised of his rights and had knowingly decided to waive them.

Id. at 469.

In addition to the fifth amendment violation, the Court in Smith found that defendant's sixth amendment right to assistance of counsel had been denied by the introduction of the same adverse

psychiatric testimony. The competency exam took place after Smith had been indicted and an attorney appointed to represent him. His right to counsel had attached when Dr. Grigson examined him at the Dallas County Jail, and their interview proved to have occurred at a "critical stage" of the aggregate proceedings against respondent. Id. at 470. Yet, defense counsel was not apprised in advance of the scope of the examination--that it would comprehend the issue of defendant's propensity for future violence. Because of the significance of the ultimate purpose of interview, defendant was denied the effective assistance of his attorneys in deciding whether to participate in the examination. The Court stated, "The decision to be made regarding the proposed psychiatric evaluation is 'literally a life or death matter' and is 'difficult . . . even for an attorney. . . . [A] defendant should not be forced to resolve such an important issue without 'the guiding hand of counsel'." Id. at 471, quoting Smith v. Estelle, 602 F.2d 694, 708 (5th Cir. 1979).

In the present case, the State moved for the psychiatric evaluation of petitioner, which was subsequently ordered by the court. This examination was ordered even though defense attorneys had not put into issue White's competency to stand trial. It has not been shown, nor has the respondent alleged, that petitioner was advised of his right to refuse to submit to the mental examination; that petitioner was informed that the contents of it might be used against him at trial: or

that he had knowingly and intelligently relinquished his fifth amendment right. See Edwards v. Arizona, 451 U.S. 477, 482 (1981); Miranda v. Arizona 384 U.S. 436, 469 (1966).

Respondent contends that the fifth amendment is not implicated because, unlike in Smith, the testimony of Drs. Brown and Nottingham was not based on the content of the psychiatric evaluation. Respondent poses the hypothetical questions as barriers between petitioner's disclosures at the pretrial examination and the testimony of the doctors at the sentencing. This court disagrees. This court simply does not credit the State's assertions that the psychiatric prognosis of Larry Wayne White's future dangerousness was not influenced by and derived from information gleaned from the pretrial evaluation. The doctors had previously interviewed the petitioner; they knew they were testifying at the sentencing hearing of Larry Wayne White. The facts of the hypotheticals were the facts of White's criminal history, and the hypotheticals followed closely upon questions as to petitioner's competency to stand trial. In one hypothetical, Larry Wayne White's name was used. A hypothetical is not a hypothetical just because it is initiated by the word "assume" or "if." The hypothetical questions asked Drs. Nottingham and Brown hover too closely over the contents of the psychiatric evaluations to be believable as mere suppositions. Moreover, at the evidentiary hearing, Dr. Brown stated that, in all honesty, he could not say that the examination of defendant had not influenced his testimony.

Even assuming arguendo that the testimony of the doctors was not based on the psychiatric interview with Larry Wayne White, the juxtaposition of the testimony, as well as the testimony itself, gave the appearance to the jury that the opinions as to petitioner's propensity for future violence were so derived. The jurors were aware that the doctors had conducted the pretrial psychological evaluations. The queries about antisocial personalities and future dangerousness followed on the heels of questions about White's competency to stand trial. The jurors were familiar with petitioner's criminal record. They could not miss the implication of the state's identification of the subject of the hypothetical as Larry Wayne White. When all these factors are considered, it is clear that the jurors were incapable of distinguishing between the hypothetical and the case of petitioner before them.

The fifth amendment commands that "[no] person . . . shall be compelled in any criminal case to be a witness against himself." This court is of the opinion that the strictures of this amendment encompass the testimony given by Drs. Nottingham and Brown. The fifth amendment does not operate in a vacuum, but in relation to the jury. If the jury is unable to distinguish between a hypothetical and the case before it, and this inability was not fortuitous, but a result of the State's deliberate actions, then the petitioner was, indeed, compelled to be a witness against himself in abrogation of this constitutional right.

2. The Direct Questions

In addition to the hyotheticals, in one instance, Dr. Brown was asked a direct question about petitioner.

The exchange went as follows:

> Q: (By the State) Would you explain to us, sir, what a sociopath is, or an antisocial personality?
> A: This is a type of personality disorder characterized principally by an absence of remorse or guilt on the part of a person for any past actions that he may have committed. . . . These people are typically self-centered; they're hedonistic; they're oriented more or less toward the moment and consider little in terms of the future consequences in evaluating the impact of their behavior or what might happen to them.
> Q. Does the word "hedonistic" mean someone who feels that pleasure or fun is the most important thing in life?
> A: Or one of the most important things, or thrill.
> Q: From your evaluation of this defendant, I noticed that you considered him to be hedonistic?
> A: Yes, I did.

Respondent argues that consideration of Dr. Brown's response to the question concerning hedonism is barred by the rule of Wainwright v. Sykes, 433 U.S. 72 (1977), since defense counsel entered no objection to it at the time it was offered. The State also asserts that the statement was only a minor and unimportant part of Dr. Brown's testimony and not related to the evidence concerning White's future dangerousness. Preliminarily, this court must state that it considers very little that goes on at trial to be minor and unimportant, when a person's life is at stake. The fifth amendment does not speak in terms of quantity nor qualify its prohibition by stating that a person may be compelled to be a witness against himself just a little. It is an absolute prohibition. Moreover, this courts feels that a direct

assertion by the psychologist that White was hedonistic had a great impact on the jury and was devastating to petitioner's effort to be sentenced to life rather than death.

With regard to the rule in Sykes, it is well-settled that a federal court is not precluded from considering the merits of a ground for habeas corpus relief by reason of a failure to make a contemporaneous objection, when the state courts have already reached the merits of the claim, rather than relying on the contemporaneous objection rule to deny relief. Miller v. Estelle, 677 F.2d 1080, 1084 (5th Cir. 1982); Thomas v. Blackburn, 623 F.2d 383, 386 (5th Cir. 1980), cert. denied, 450 U.S. 953 (1981). This principle holds true no matter how cursorily or summarily the state court disposes of the merits of a petitioner's claim. Miller v. Estelle, 677 F.2d at 1084. See e.g., Thomas v. Blackburn, 623 F.2d at 386 n.1. In this case the state courts failed to explain whether the writ of habeas corpus was denied on the merits or because of a procedural default.11/ However, failure to do so creates a presumption that the decision to deny relief was based on the merits and does not bar federal review. Bell v. Watkins, No. 81-4358, slip.op. at 7-8 (5th Cir. Dec. 6, 1982).

Another reason for not deferring to the contemporaneous objection rule in this instance is that the same fifth amendment issue implicated by Dr. Brown's statement about hedonism is already being considered in connection with the use of the hypothetical questions. Therefore, in so far as the purpose of

the Texas contemporaneous objection rule is to "encourage the presentation and resolution of constitutional issues at trial," St. John v. Estelle 563 F.2d 168, 172 (5th Cir. 1977) (Tjoflat, J., dissenting), a strict adherence to the rule in this case would not further this purpose.

Having cleared the hurdle of Sykes, the issue of the constitutionality of Dr. Brown's statement may be reached. Therefore, although this court does not base its vacation of petitioner's sentence solely upon Dr. Brown's statement, it concludes, for the reasons elucidated in Smith and discussed earlier in this opinion, that this statement alone is enough to invalidate petitioner's sentence.

B. The Sixth Amendment Violation

Petitioner's sixth amendment right had attached at the time he submitted to the pretrial psychiatric interviews. White had been indicted and counsel appointed; adversarial proceedings had been initiated gainst him. There was vital need for his attorney's aid in deciding whether and how much to participate in the psychological evaluations. Estelle v. Smith, 451 U.S. at 469-70; Kirby v. Illinois, 406 U.S. 682, 688-89 (1972) (plurality opinion); Smith v. Estelle, 602 F.2d 694, 708-9 (5th Cir. 1979). Although it is conceded that, given the character of a psychiatric examination, the need for sixth amendment protection does not go so far as to mandate the presence of counsel during the interview

itself, Smith v. Estelle, 602 F.2d at 708; United States v. Cohen, 530 F.2d 43, 47-48 (5th Cir. 1976), the Supreme Court has recognized that a defendant has a right to consult with his attorney before the interview. Estelle v. Smith, 451 U.S. at 470-71; Gholson v. Estelle, 675 F.2d 734, 743 (5th Cir. 1982).

In answer to petitioner's allegations of sixth amendment violations, respondent contends that White did have assistance of counsel prior to the examination, and that, thus, these rights are not implicated. The State bases this contention on court-appointed defense counsel's statement at the evidentiary hearing that it was his practice to "advise all clients not to discuss incriminating matters with the examiners." 12/

The Fifth Circuit has made it clear that the protection of the sixth amendment requires something more such than cursory and vague counselling by petitioner's attorney that, defendant is "not to discuss incriminating matters with the examiners." In Smith the circuit court elaborated on the crucial role counsel is to play in advising his client on the complex question of whether to submit to a psychological evaluation: "This is a vitally important decision, literally a life or death matter. It is a difficult decision even for an attorney; it requires a knowledge of what other evidence is available, of the particular psychiatrist's biases and predelictions, of possible alternative strategies at the sentencing hearing." Smith v. Estelle,602 F.2d at 708-09, quoting Powell v. Alabama, 287 U.S. 45, 57 (1933). In Gholson v. Estelle, 675 F.2d at 743, n.9, the court dismissed the

government's argument that the defendant's sixth amendment rights had not been violated because defense counsel may have counselled their clients in general terms about possible future psychiatric examinations. The court said: "The sixth amendment's protection contemplates more than a casual discussion between attorney and client regarding the vague possibility that the client may be examined at some indefinite time in the future for the purpose of aiding in the determination of whether he should be executed." Id. at 743.

In the case sub judice, it is apparent that the sixth amendment standard of the Fifth Circuit has not been met. There has been no showing that the kind of well thought-out, individually-tailored counselling session between attorney and petitioner mandated by the Supreme Court and Fifth Circuit preceded the examination. 13/ Therefore, this court is of the opinion that petitioner's sixth amendment right to the assistance of counsel was violated by the introduction of the doctors' testimony at the sentencing hearing.

V. PREDICTIONS OF FUTURE DANGEROUSNESS

This court has serious reservations about the use of psychiatric predictions based on hypotheticals and doubts their validity when the doctor has had no previous contact with the defendant. The prevailing view among psychiatrists and professional psychiatric associations, a view to which this court subscribes, is that to the extent that long-range dangerousness

can be predicted (a view not accepted by the psychiatric community),[14] an opinion as to an individual's future penchant for violence which does not follow extensive examination and is not based on a great deal of complex and in-depth information, is not a professional, but a lay opinion.[15] However, when this lay opinion is proferred by a witness bearing the title of "Doctor," its impact on the jury is much greater than if it were not masquerading as something it is not.

VI. CONCLUSION

For the reasons given above, this court has determined that petitioner Larry Wayne White's fifth, sixth, and fourteenth amendments were violated by the introduction of testimony by Drs. Cottingham and Brown at the penalty phase of petitioner's trial. In addition, this court is of the opinion that prohibiting the type of psychiatric testimony at issue in this case would go a long way toward insuring the kind of fair judicial proceedings that is mandated by the Supreme Court.

Accordingly it is ORDERED, ADJUDGED, and DECREED that petitioner's writ of habeas corpus be, and the same is, GRANTED.

DONE this 30th day of December, 1982 in Houston, Texas.

UNITED STATES DISTRICT JUDGE

FOOTNOTES

1. Texas v. Larry Wayne White, Cause No. 260,938.

2. Statement of Facts. State v. White (hereinafter referred to as Record.) at 12.

3. These special issues are:

   1. whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with reasonable expectation that the death of the deceased or another would result.

   2. whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

   3. if raised by the evidence, whether the conduct of the defendant in killing the decesed was unreasonable in response to the provocation, if any, by the deceased.

4. Petitioner's conviction was affirmed by the Texas Court of Criminal Appeals on January 21, 1981, in White v. State, 610 S.W. 2d 504 (Tex. Crim. App. 1981). Petitioner filed for state habeas corpus relief in the state trial court on June 23, 1981. On June 25, 1981, that court recommended that relief be denied. On June 26, 1981, the Texas Court of Criminal Appeals also denied relief.

5. The fifth and sixth amendments are made applicable to the states through the fourteenth Amendment.

6. This court finds that constitutional violations occurred only in the punishment phase and not in the guilt or innocence proceedings. This grant of petitioner's writ is intended to effect only his sentence and not his conviction.

7. Since this court has determined that relief should be granted because of the fifth and sixth amendment violations, it need not reach petitioner's other claims.

8. White's attorneys had been notified in advance that the psychiatric examinations would be conducted. In this regard, this case is factually different from Estelle v. Smith, 451 U.S. 454 (1981). In the latter, neither formal or informal notification of an impending mental evaluation was given.

9. Record at 1681

10. Id. at 1700-01

11. The Texas Court of Criminal Appeals denied petitioner's writ of habeas corpus without comment. Ex Parte Larry Wayne White, No. 1059 (Tex. Crim. App. June 26, 1981) (per curiam). The state trial court stated, "Petitioner has failed to demonstrate that his convicton was improperly obtained. Accordingly, it is recommended to the Texas Court of Criminal Appeals that his request for stay of execution and new trial be denied."

12. Evidentiary Hearing of August 9, 1982, at 83-184 (hereinafter cited as E.H.).

13. Petitioner White testified that he was never advised by either of his attorneys about his constitutional rights in relation to the competency examinations. E.H. at 10-11. Court-appointed trial counsel, Armando Martinez, also testfied that he had not advised petitioner of these rights. E.H. at 28.

14. See Brief Amicus Curiae for the American Psychiatric Assoc. at 11-17, Estelle v. Smith, 451 U.S. 454 (1981).

15. E.H. at 93-99 (Testimony of Dr. Jane Preston, expert witness for petitioner).

MR. BROWN: YES, SIR.

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BE IT REMEMBERED AFTER A SHORT RECESS WITH ALL PARTIES AGAIN PRESENT IN OPEN COURT, THE FOLLOWING PROCEEDINGS WERE HAD, TO-WIT:

IN THE PRESENCE OF THE JURY

THE COURT: JUST HAVE A SEAT. THANK YOU. ARE YOU READY?

MR. LEITNER: THE STATE, YOUR HONOR, WOULD CALL DOCTOR JOHN HOLBROOK.

MR. BAILIFF: YOU HAVE BEEN PREVIOUSLY SWORN SO STEP UP AND HAVE A SEAT PLEASE.

JOHN HOLBROOK

WAS CALLED AS A WITNESS, WAS DULY SWORN, AND WAS EXAMINED AND UPON EXAMINATION TESTIFIED AS FOLLOWS, TO-WIT:

DIRECT EXAMINATION BY MR. LEITNER

MR. BROWN: YOUR HONOR, AT THIS TIME BEFORE WE BEGIN, WE'D LIKE TO IMPOSE THE SAME OBJECTION THAT WE PREVIOUSLY IMPOSED. WE DO NOT FEEL THAT THIS WITNESS IS

Exhibit "J"

QUALIFIED BY HIS EDUCATIONAL EXPERIENCE AND BACKGROUND AND MEDICAL TRAINING TO GIVE AN OPINION WITHOUT EXAMINING AN INDIVIDUAL AND HAVING NO PRIOR CONTACT WITH THAT INDIVIDUAL AS TO A PROBABILITY THAT THAT INDIVIDUAL WOULD IN ALL LIKELIHOOD -- THERE IS A PROBABILITY THAT HE WOULD COMMIT FUTURE ACTS OF CRIMINAL VIOLENCE THAT WOULD CONSTITUTE A CONTINUING NATURE OF THREAT TO SOCIETY.

THE COURT: OVERRULED.

MR. LEITNER: MAY I WAIT JUST A SECOND, YOUR HONOR?

THE COURT: YES, SIR. WOULD YOU PLEASE. THANK YOU.

DIRECT EXAMINATION BY MR. LEITNER

Q WOULD YOU STATE YOUR NAME PLEASE?

A JOHN T. HOLBROOK.

Q AND MR. HOLBROOK, HOW ARE YOU EMPLOYED?

A I'M A PHYSICIAN AND PSYCHIATRIST.

Q WOULD YOU TELL THIS JURY PLEASE WHERE YOU NOW ARE EMPLOYED AND WHAT YOUR FIELD -- WHAT YOU ACTUALLY SPECIALIZE IN IN THE FIELD OF PSYCHIATRY?

A I'M SELF EMPLOYED. I HAVE MY OWN OFFICE IN DALLAS, TEXAS. THE MAJOR PART OF MY PRACTICE IS IN THE AREA OF FORENSIC PSYCHIATRY.

Q IF YOU WILL PLEASE, WILL YOU GIVE THIS JURY THE BENEFIT OF ALL THE QUALIFICATIONS THAT YOU NOW POSSESS TO BE

A MEDICAL DOCTOR IN THE FIELD OF PSYCHIATRY?

A I SERVED MY UNDERGRADUATE TRAINING AT TEXAS CHRISTIAN UNIVERSITY. I DID MY GRADUATE WORK AT THE UNIVERSITY OF TEXAS MEDICAL SCHOOL, SOUTHWESTERN. I SERVED MY INTERNSHIP AT BAYLOR UNIVERSITY MEDICAL CENTER. DURING THIS TIME I WAS AN EXTERN AT TIMBERLAWN HOSPITAL. I SERVED MY THREE YEAR RESIDENCY IN NEUROPSYCHIATRY AT A -- CERTIFIED PSYCHIATRY AT TIMBERLAWN AND PARKLAND HOSPITAL. I THEN BECAME A STAFF MEMBER AT BEVERLY HILLS HOSPITAL, A PRIVATE PSYCHIATRIC HOSPITAL AND WAS THERE FROM APPROXIMATELY NINETEEN -- EARLY PART OF SIXTY-TWO UNTIL NINETEEN SIXTY-EIGHT. AT THAT TIME I WENT WITH THE TEXAS DEPARTMENT OF CORRECTIONS AS CHIEF OF PSYCHIATRY THERE AND REMAINED THERE UNTIL NINETEEN SEVENTY-THREE. DURING THAT SAME TIME I SET UP A COMMUNITY MENTAL HEALTH CENTER FOR REGION THIRTEEN IN BRYAN, TEXAS, AS EXECUTIVE CLINICAL DIRECTOR THERE. I THEN CAME BACK TO DALLAS IN NINETEEN SEVENTY-THREE AND WORKED PART TIME IN THE OFFICE AT BEVERLY HILLS HOSPITAL AS A CONSULTANT TO THEM IN SOMATIC AND PHYSICAL MEDICINE IN RELATION TO TREATMENT OF MENTAL ILLNESS IN THE HOSPITAL. I REMAINED THERE UNTIL JANUARY OF THIS YEAR AT WHICH TIME THE MENTAL HEALTH AND MENTAL RETARDATION RELEASED THAT HOSPITAL AND I THEN OPENED MY OFFICE ON L.B.J. FREEWAY, SIXTY-THREE FIFTY, AND HAVE REMAINED THERE SINCE THAT TIME OFFICING IN THAT

PARTICULAR PLACE.

Q IS YOUR LICENSE TO PRACTICE MEDICINE PRESENTLY ON FILE IN THE COUNTY CLERK'S OFFICE THERE AT DALLAS COUNTY, TEXAS?

A IN DALLAS AND BRAZOS COUNTY, YES.

Q HAVE YOU HAD AN OCCASION TO ALSO WRITE DIFFERENT PERIODICALS, DIFFERENT ARTICLES IN THE FIELD OF PSYCHIATRY AND HAVE THOSE ARTICLES PUBLISHED?

A YES, I HAVE.

Q WOULD YOU PLEASE GIVE US THE BENEFIT OF SOME OF THOSE ARTICLES?

A AS I SAID BEFORE THE MOST RECENT ONES ARE FROM SEVENTY-FOUR TO THE PRESENT. THERE WOULD HAVE BEEN AN ARTICLE IN THE LAWYER'S FORUM IN NINETEEN SEVENTY-FOUR ON PSYCHIATRY AND POLYGRAPH IN THE BAYLOR LAW REVIEW IN NINETEEN SEVENTY-FIVE THE FALL ISSUE. AN ARTICLE ON THE TARRASA CASE, THE DUTY TO WARRANT, LAW OF PSYCHOTHERAPY DUTY TO WARRANT A TRAGIC TRILOGY I BELIEVE WAS THE TITLE OF THAT. I PRESENTED A PUBLICATION TO THE BAYLOR UNIVERSITY GRADUATE SCHOOL IN PSYCHOLOGY HERE IN SEVENTY-FOUR, COLLOQUIUM SERIES AND AT THE SAME TIME AT THE DEPARTMENT OF NEUROLOGY AND PSYCHIATRY AT THE V.A. HOSPITAL ON THE PARTICULAR PSYCHOLOGICAL, SOCIOLOGICAL AND PSYCHOPHYSIOLOGICAL DEFECTS APPARENT IN THE PRIMARY AND SECONDARY PSYCHOPATH. I COMPILED A SET OF STANDARDS AS A CONSULTANT

FOR THE WACO VETERANS ADMINISTRATION HOSPITAL'S PSYCHIATRY DEPARTMENT ON THE SETTING UP OF A MAXIMUM SECURITY UNIT HERE AND A NUMBER OF OTHERS IN TERMS OF LECTURE SERIES AND ACADEMIES AND SO FORTH AND SO ON.

Q DID YOU HAVE AN OCCASION BEFORE THIS DATE TO BE CALLED TO TESTIFY IN CRIMINAL CASES AND GIVE JURIES IN DIFFERENT CRIMINAL CASES THE BENEFIT OF YOUR EXPERTISE IN THE FIELD OF PSYCHIATRY?

A YES, I HAVE.

Q WERE YOU EVER CALLED TO TESTIFY TO THAT EXTENT BEFORE YOU WENT BACK TO THE TEXAS DEPARTMENT OF CORRECTIONS TO BE THE CHIEF OF THEIR PSYCHIATRIC SERVICE?

A YES, I HAVE -- AS I SAID, EVEN BEFORE I WENT INTO MEDICINE, I WORKED AS A PSYCHOLOGIST WITH CORRECTIONS IN NINETEEN FIFTY-ONE AND CONTINUED IN THAT AFTER MY BASIC MEDICAL TRAINING WHEN I WAS IN PSYCHIATRIC RESIDENCY AND EVEN AFTER THAT TIME.

Q IF YOU WOULD PLEASE, THEN TELL THIS JURY WHY YOU WENT TO THE TEXAS DEPARTMENT OF CORRECTIONS AND ACCEPTED THAT POSITION AS CHIEF OF THE PSYCHIATRIC SERVICE THERE AT THE TEXAS DEPARTMENT OF CORRECTIONS?

A PRIMARILY TO REINFORCE THROUGH A PROLONGED CORRECTIONAL EXPERIENCE SOME OF MY EXPERIENCES I HAD PRIOR TO THAT TIME IN DOING CRIMINAL EVALUATIONS. I HAD KNOWN AT LEAST EIGHT OR NINE PEOPLE WHO WERE ON DEATH ROW THAT I

HAD TESTIFIED IN THEIR CASES. I HAD KNOWN LITERALLY HUNDREDS OF INMATES THAT I HAD SEEN PRETRIAL. I WANTED TO GO BACK AND LOOK AT THEM AND BE CERTAIN THOSE OPINIONS THAT I HAD WERE ACCURATE AT THE TIME OF TRIAL AND PRE-TRIAL. I ALSO WANTED TO GAIN THE EXPERIENCE AND WORKING KNOWLEDGE OF WHAT A CORRECTIONAL INSTITUTION IS ABOUT. BUT IT WAS ROUNDING OUT PART OF MY EDUCATION FROM MY POINT OF VIEW.

Q SINCE THE TIME THAT YOU HAVE THEN LEFT THE TEXAS DEPARTMENT OF CORRECTIONS, HAVE YOU THEN SINCE THAT TIME BEEN CALLED TO TESTIFY AS AN EXPERT IN DIFFERENT CRIMINAL CASES?

A YES, I HAVE.

Q HAVE YOU AGAIN BEEN CALLED TO TESTIFY AS AN EXPERT IN DEATH PENALTY CASES?

A YES, I HAVE.

Q HAVE YOU BEEN CALLED BOTH BY THE STATE AND BY THE DEFENSE ATTORNEYS TO GIVE OPINIONS AS TO THE -- YOUR OWN -- YOURSELF TO GIVE OPINIONS AS TO WHETHER OR NOT YOU CAN PREDICT DANGEROUSNESS IN FUTURE CONDUCT OF AN INDI-VIDUAL?

A IN DEATH PENALTY CASES, YES.

Q I'D LIKE TO DRAW YOUR ATTENTION BACK TO YOUR TIME AT THE TEXAS DEPARTMENT OF CORRECTIONS WHEN YOU WERE THE CHIEF OF THE PSYCHIATRIC SERVICE AND ASK YOU IF DURING

YOUR TIME IN THE TEXAS DEPARTMENT OF CORRECTIONS AS THE CHIEF OF THE PSYCHIATRIC SERVICE, DID YOU HAVE AN OCCASION ON A DAY BY DAY OR OFTEN BASIS IN YOUR JOB THERE TO PREDICT THE FUTURE DANGEROUSNESS OF INDIVIDUALS AND DIFFERENT INMATES THAT WERE THERE INCARCERATED WITH THE TEXAS DEPARTMENT OF CORRECTIONS?

A YES. THIS WAS A FAIRLY SIZEABLE PART OF MY FUNCTION IN CORRECTION WAS TO DETERMINE WHETHER OR NOT AN INDIVIDUAL WOULD BEHAVE A CERTAIN WAY UNDER CERTAIN CIRCUMSTANCES AFTER EVALUATING EITHER IN THE DIAGNOSTIC UNIT IN THE SCREENING PROCEDURE OR AS THE INDIVIDUAL WOULD BE SENT IN FROM AN OUTLYING UNIT TO THE CENTRAL UNIT OR TO THE TREATMENT CENTER BY WARDENS OR OTHER CUSTODIAL PERSONNEL OR BY THE ADMINISTRATION TO MAKE A DETERMINATION RELATIVE TO THEIR FUTURE BEHAVIOR UNDER CERTAIN KINDS OF CIRCUMSTANCES.

Q ONCE AGAIN TO REMOVE YOU FROM THE TIME YOU WERE AT THE TEXAS DEPARTMENT OF CORRECTIONS, HAS IT BOTH PRIOR TO THAT TIME AND SUBSEQUENT TO THAT TIME, HAVE YOU HAD AN OCCASION TO PERFORM FEW OR MANY CRIMINAL EVALUATIONS, PSYCHIATRIC EVALUATIONS OF INDIVIDUALS WHO WERE EITHER CONVICTED OF OR CHARGED WITH CRIMINAL OFFENSES?

A MANY.

Q CAN YOU TELL THIS JURY FOR WHOM YOU WOULD CONDUCT THOSE DIFFERENT PSYCHIATRIC EVALUATIONS?

A WELL, AS I SAID, ALMOST ANYONE WHO WOULD REQUEST THAT. IT WOULD BE DEFENSE ATTORNEYS, STATE ATTORNEYS, JUDGES, STATE AND FEDERAL, FEDERAL ATTORNEYS, ATTORNEYS WHO ARE INVOLVED IN FEDERAL COURTS, ATTORNEY GENERAL, CORRECTIONS. ALMOST ANY AGENCY THAT WOULD MAKE THOSE KIND OF REFERRALS.

Q SINCE JANUARY OF NINETEEN SEVENTY-FOUR, HAVE YOU HAD AN OCCASION TO TESTIFY IN DEATH PENALTY CASES WHERE THE JURY WOULD HAVE TO ANSWER TWO QUESTIONS AND ONE OF THOSE QUESTIONS BEING WHETHER OR NOT A PARTICULAR DEFENDANT, IT WOULD BE PROBABLE THAT HE WOULD COMMIT CRIMINAL ACTS OF VIOLENCE IN THE FUTURE THAT WOULD CONSTITUTE A CONTINUING THREAT TO SOCIETY?

A YES, I HAVE.

Q HAVE YOU TESTIFIED IN DEATH PENALTY CASES WHERE YOU GAVE OPINIONS YOURSELF THAT WERE FAVORABLE EITHER TO THE STATE OR TO THE DEFENSE?

A I HAVE IN BOTH SITUATIONS.

Q YOU HAVE GIVEN TESTIMONY THAT WAS FAVORABLE TO BOTH SIDES ON DIFFERENT OCCASIONS?

A YES, I HAVE.

Q I WOULD ALSO ASK YOU, DOCTOR HOLBROOK, IF IT'S WITHIN YOUR CAPACITY AS A DOCTOR OF PSYCHIATRY TO PREDICT THE FUTURE DANGEROUSNESS OF AN INDIVIDUAL WITHIN A REASONABLE MEDICAL CERTAINTY IF YOU WERE SUPPLIED WITH ENOUGH BACK-

GROUND DATA ABOUT THAT INDIVIDUAL?

A YES, I THINK THAT'S POSSIBLE.

Q IF YOU, YOURSELF, -- LET'S TAKE A PSYCHIATRIST JUST AS YOURSELF WITH THE SAME TYPE OF EXPERIENCE THAT YOU HAVE, IF AN INDIVIDUAL SUCH AS YOURSELF IS SUPPLIED WITH ADEQUATE BACKGROUND INFORMATION ABOUT AN INDIVIDUAL BUT YOU ACTUALLY NEVER HAVE SEEN THAT INDIVIDUAL OR NEVER HAVE PERFORMED AN ACTUAL FACE TO FACE EVALUATION PROCESS WITH HIM, CAN YOU GIVE AN EXPERT MEDICAL OPINION THAT WOULD BE WITHIN REASONABLE PSYCHIATRIC CERTAINTY AS TO WHETHER OR NOT THAT INDIVIDUAL WOULD BE DANGEROUS TO THE DEGREE THAT THERE WOULD BE A PROBABILITY THAT THAT PERSON WOULD COMMIT CRIMINAL ACTS OF VIOLENCE IN THE FUTURE THAT WOULD CONSTITUTE A CONTINUING THREAT TO SOCIETY IF YOU HAVE BEEN SUPPLIED WITH ADEQUATE BACKGROUND INFORMATION?

A YES.

Q I WILL FIRST ASK YOU, DO YOU KNOW THE DEFENDANT IN THIS CASE, THOMAS A. BAREFOOT?

A I DO NOT.

Q HAVE YOU EVER HAD AN OCCASION TO TALK WITH HIM BEFORE?

A I HAVE NOT BEFORE TODAY.

Q DOCTOR HOLBROOK, I WOULD NOW ASK YOU IF YOU WOULD PLEASE TO ALLOW ME TO GIVE YOU A HYPOTHETICAL FACT SITUATION. I WOULD ASK THAT YOU ASSUME THAT MY HYPOTHETICAL FACT SITUATION IS TRUE. AFTER I HAVE COMPLETELY GONE

OVER THIS HYPOTHETICAL FACT SITUATION I WILL THEN INQUIRE AS TO WHETHER OR NOT I HAVE GIVEN YOU SUFFICIENT BACK-GROUND DATA TO MAKE A -- BASE AN OPINION AS TO THE FUTURE DANGEROUSNESS OF THAT INDIVIDUAL WHEN WE'RE FINISHED. ONCE AGAIN I'LL PREFACE, I'LL ASK YOU IF YOU WILL PLEASE TO ASSUME THE FACTS THAT I'M TELLING YOU AT THIS PARTI-CULAR TIME ARE TRUE. DOCTOR HOLBROOK, WE'LL FIRST START OUT WITH AN INDIVIDUAL THAT IS APPROXIMATELY THIRTY-THREE YEARS OF AGE AND WE'LL GO BACK IN TIME TO THE YEAR NINETEEN SIXTY-NINE WHEN THAT INDIVIDUAL WAS APPROXIMATELY TWENTY-FOUR YEARS OF AGE. STARTING AT THAT POINT IN TIME, DOCTOR, I'LL ASK YOU IF YOU WILL ASSUME PLEASE THAT DURING THE YEAR OF NINETEEN SIXTY-NINE THE INDIVIDUAL THAT WE'RE TALKING ABOUT HAD ACQUIRED A BAD REPUTATION FOR THE CHARACTER TRAIT OF BEING PEACEFUL AND HAD ALSO ACQUIRED THE BAD REPUTATION FOR THE CHARACTER TRAIT OF BEING LAW ABIDING IN THE COMMUNITY SURROUNDING MORGAN CITY LOUISIANA. I'LL THEN ASK YOU TO ASSUME THAT SOME THREE YEARS LATER IN THE YEAR OF NINETEEN SEVENTY-TWO, THAT SAME INDIVIDUAL IN THE COMMUNITY SURROUNDING NEW IBERIA, LOUISIANA HAD ONCE AGAIN ACQUIRED A BAD REPUTATION IN THE COMMUNITY FOR BEING PEACEFUL AND A BAD REPUTATION IN THE COMMUNITY FOR BEING LAW ABIDING. DOCTOR HOLBROOK, I WOULD ASK YOU FURTHER TO ASSUME THAT IN THE YEAR NINETEEN SEVENTY-THREE TO NEXT YEAR, STILL WITHIN THE STATE OF

LOUISIANA IN THE COMMUNITY OF LAFAYETTE, LOUISIANA THE SAME INDIVIDUAL HAS ONCE AGAIN ACQUIRED A BAD REPUTATION IN THE COMMUNITY FOR BEING PEACEFUL AND A BAD REPUTATION IN THE COMMUNITY FOR BEING LAW ABIDING. I'LL FURTHER ASK YOU TO ASSUME THAT IN THE YEAR NINETEEN SEVENTY-FOUR, THE NEXT YEAR, THAT THIS SAME INDIVIDUAL WAS CONVICTED OF A FELONY OFFENSE OF DISTRIBUTION OF MARIJUANA AND WAS SENTENCED TO FIVE YEARS IN PRISON AT HARD LARBOR PROBATED AND ONE YEAR TO DO IN THE PARISH JAIL IN LOUISIANA. I'LL FURTHER ASK YOU TO ASSUME THAT DURING THE YEAR OF NINETEE SEVENTY-FOUR THIS SAME INDIVIDUAL THAT WE'RE TALKING ABOUT, WAS CONVICTED OF THE FELONY OFFENSE OF POSSESSION OF AMPHETAMINES. FURTHER I'LL ASK YOU TO --

A WHAT YEAR WAS THAT?

Q EXCUSE ME?

A WHAT YEAR WAS THAT FIRST POSSESSION?

Q THE DISTRIBUTION OF MARIJUANA IN THE YEAR NINETEEN SEVENTY-FOUR AND THE POSSESSION OF AMPHETAMINE PENALTY WAS ALSO IN THE YEAR OF NINETEEN SEVENTY-FOUR. I'LL FURTHER ASK YOU TO ASSUME ALSO IN THE YEAR OF NINETEEN SEVENTY-FOUR THIS SAME INDIVIDUAL THAT WE'RE TALKING ABOUT, WAS CONVICTED OF THE OFFENSE OF UNLAWFULLY CARRYING A WEAPON. ONCE AGAIN IN THE YEAR OF NINETEEN SEVENTY-FOUR I WOULD ASK YOU TO ASSUME THAT THAT INDIVIDUAL WAS CONVICTED OF THE OFFENSE OF POSSESSION OF MARIJUANA. THEN

I'D ASK YOU TO GO TO THE YEAR OF NINETEEN SEVENTY-FIVE AND I'D ASK YOU TO ASSUME IN THE YEAR OF NINETEEN SEVENTY FIVE THIS SAME INDIVIDUAL HAD ACQUIRED OR RENEWED HIS BAD REPUTATION IN THE COMMUNITY OF NEW IBERIA, LOUISIANA AND LAFAYETTE, LOUISIANA FOR BEING -- FOR HAVING A BAD REPUTATION FOR BEING PEACEFUL AND A BAD REPUTATION FOR BEING LAW ABIDING. THEN I'D ASK YOU TO ASSUME THAT IN THE YEAR OF NINETEEN SEVENTY-FIVE IN THE COMMUNITY OF OKLAHOMA CITY, OKLAHOMA, THAT THIS SAME INDIVIDUAL HAD ACQUIRED FOR HIMSELF A BAD REPUTATION FOR BEING PEACEFUL AND A BAD REPUTATION FOR BEING LAW ABIDING.* DOCTOR, I'D FURTHER ASK YOU IF YOU WILL PLEASE, TO ASSUME THAT DURING THE YEAR OF NINETEEN SEVENTY-FIVE, THIS SAME INDIVIDUAL WAS CONVICTED IN THE WESTERN DISTRICT FEDERAL COURT IN THE WESTERN DISTRICT OF OKLAHOMA FOR THE FEDERAL FELONY OFFENSE OF CARRYING AN UNREGISTERED FIREARM, THAT BEING A SAWED OFF SHOTGUN AND WAS SENTENCED TO DO TIME IN THE FEDERAL PRISON. I WOULD FURTHER ASK YOU TO ASSUME THAT IN THE YEAR OF NINETEEN SEVENTY-SIX THIS SAME INDIVIDUAL ACQUIRED A BAD REPUTATION FOR BEING PEACEFUL AND A BAD REPUTATION FOR BEING LAW ABIDING IN THE COMMUNITY OF ODESSA, ECTOR COUNTY, TEXAS. I WILL ALSO ASK YOU THEN TO GO TO THE YEAR OF NINETEEN SEVENTY-SEVEN, AND I'LL ASK YOU TO ASSUME THAT IN THE YEAR OF NINETEEN SEVENTY-SEVEN IN THE COMMUNITY OF WOODWARD, OKLAHOMA,

THAT THIS SAME INDIVIDUAL HAD ACQUIRED FOR HIMSELF A BAD REPUTATION FOR BEING PEACEFUL AND A BAD REPUTATION FOR BEING LAW ABIDING. I'LL FURTHER ASK YOU TO ASSUME THAT IN THE SAME YEAR, THAT BEING THE YEAR OF NINETEEN SEVENTY-SEVEN, THIS SAME INDIVIDUAL IN THE COMMUNITY OF NEODESHA, KANSAS, HAD ACQUIRED A BAD REPUTATION FOR BEING PEACEFUL AND A BAD REPUTATION FOR BEING LAW ABIDING. I'LL FURTHER ASK YOU TO ASSUME THAT IN THE YEAR OF NINETEEN SEVENTY-SEVEN, IN THE COMMUNITY OF GRANTS, NEW MEXICO AND LOS LUNAS, NEW MEXICO, THIS SAME INDIVIDUAL HAD ONCE AGAIN ACQUIRED A BAD REPUTATION FOR BEING PEACEFUL AND A BAD REPUTATION FOR BEING LAW ABIDING. I'LL ASK YOU TO ASSUME THEN ALSO IN THE YEAR OF NINETEEN SEVENTY-EIGHT, IN THE COMMUNITY SURROUNDING VALENCIA COUNTY, NEW MEXICO, THIS INDIVIDUAL ENJOYED AT THAT TIME A BAD REPUTATION FOR BEING PEACEFUL AND A BAD REPUTATION FOR BEING LAW ABIDING. I'LL FURTHER ASK YOU TO ASSUME THAT ON JANUARY THE NINETEENTH OF NINETEEN SEVENTY-EIGHT, THE SAME INDIVIDUAL WAS INCARCERATED IN THE VALENCIA COUNTY JAIL AWAITING TRIAL FOR A THREE COUNT FELONY INDICTMENT. I'LL ASK YOU TO ASSUME THAT IN AN EFFORT TO AVOID PROSECUTION FOR THOSE CHARGES, THAT SAME INDIVIDUAL UNLAWFULLY ESCAPED FROM CUSTODY IN VALENCIA COUNTY JAIL AND FROM THAT DAY FORWARD BECAME A FUGITIVE FROM JUSTICE. I'LL THEN ASK YOU TO GO TO JUNE OF NINETEEN SEVENTY-EIGHT TO THE CENTRAL

TEXAS CITY OF KILLEEN WHICH IS LOCATED IN BELL COUNTY, TEXAS. I'LL ASK YOU TO ASSUME THAT THIS SAME INDIVIDUAL THAT WE'RE TALKING ABOUT WHILE IN THE CITY OF KILLEEN, BELL COUNTY, TEXAS WAS LOCATED IN A PUBLIC RESTAURANT AND WHILE IN THAT PUBLIC RESTAURANT HE MET A PERSON THAT WE WILL CALL ROBERT ROBERSON. AND ON THAT FIRST MEETING IN THAT PUBLIC RESTAURANT IN THE RESTROOM FACILITY HE DISCUSSED WITH THAT INDIVIDUAL, ROBERT ROBERSON, THE SALE OF METHAMPHETAMINE OR WHAT IS CALLED ON THE STREET AS SPEED. I WOULD ASK YOU FURTHER TO ASSUME THAT POSSESSION OF METHAMPHETAMINE OR SPEED IN THE STATE OF TEXAS IS A SECOND DEGREE FELONY THAT CARRIES WITH IT A POSSIBLE PUNISHMENT OF UP TO TWENTY YEARS IN THE PENITENTIARY AND A FINE OF UP TO TEN THOUSAND DOLLARS. I'LL FURTHER ASK YOU TO ASSUME THAT DELIVERY OR THE DISTRIBUTION OF METHAMPHETAMINE IS A FIRST DEGREE FELONY IN THE STATE OF TEXAS. THAT SELLING IT, BUYING IT OR BEING A PARTY TO THE DISTRIBUTION OF METHAMPHETAMINE BEING A FIRST DEGREE FELONY CARRIES WITH IT A POSSIBLE PUNISHMENT OF LIFE IN THE TEXAS DEPARTMENT OF CORRECTIONS. I'LL ASK YOU TO ASSUME FURTHER THAT THOSE DRUG LAWS DID NOT DETER OR SLOW DOWN THE INDIVIDUAL THAT WE'RE TALKING ABOUT IN HIS DAY TO DAY ACTIONS. I'LL FURTHER ASK YOU TO ASSUME THAT THE INDIVIDUAL THAT WE'RE TALKING ABOUT THEN MEETS A PERSON BY THE NAME OF TILLER, DONNIE RAY TILLER. I'D ASK YOU TO

ASSUME FURTHER THAT WHEN HE MEETS THIS INDIVIDUAL NAMED TILLER, HE THEN TELLS MR. TILLER THE FOLLOWING STORY. HE DOES NOT TELL HIM THAT HE HAS COME FROM VALENCIA COUNTY, NEW MEXICO BUT HE TELLS HIM THAT HE LIVES IN AN ADJOINING CENTRAL TEXAS CITY BY THE NAME OF COPPERAS COVE, TEXAS. THAT HE ALSO TELLS MR. TILLER THAT WHILE IN THE CITY OF COPPER COVE, TEXAS HE BORROWED HIS FATHER'S TRUCK AND LOST IT AND FURTHER HE TELLS DONNIE RAY TILLER THAT HIS FATHER IS FIXING TO HAVE TO GO BACK TO COLLEGE AND IS GOING TO LEAVE WITHIN THE NEXT THREE DAYS AND THAT HE THEN ASKED MR. TILLER THAT IF HE COULD STAY FOR THE NEXT COUPLE OF DAYS WITH MR. TILLER AT HIS HOME IN KILEEN, TEXAS, SO HE CAN AVOID HAVING TO ANSWER THE CONSEQUENCES OF HIS ALLEGED CONDUCT WITH HIS FATHER IN COPPERAS COVE, TEXAS. I'LL ASK YOU TO FURTHER ASSUME THAT MR. TILLER AND MR. ROBERSON LIVED TOGETHER IN A TRAILER PARK IN THE CITY OF KILLEEN, TEXAS. AND I'LL ASK YOU TO ASSUME FURTHER THAT BASED ON THIS STORY THAT HAD JUST BEEN TOLD THEM BY THIS INDIVIDUAL, THAT THEY ALLOWED HIM TO STAY WITH THEM IN THEIR TRAILER FOR A PERIOD OF A COUPLE DAYS. I'LL FURTHER ASK YOU TO ASSUME THAT WHEN THIS STORY WAS TOLD TO MR. TILLER, THAT THE INDIVIDUAL THAT TOLD HIM THAT STORY ALSO TOLD HIM THAT HIS NAME WAS DARREN CALLIER AND DID NOT TELL HIM WHAT HIS TRUE NAME WAS. I'LL ASK YOU TO ASSUME FURTHER THAT

HE THEN MOVED INTO THIS TRAILER IN KILLEEN, TEXAS WITH TILLER AND ROBERSON AND INSTEAD OF BEING THERE FOR A COUPLE DAYS, HE MOVED IN ON A PERMANENT STATUS. I'LL ASK YOU TO ASSUME FURTHER THAT AFTER MOVING INTO THAT TRAILER HE WOULD CONTINUALLY ASK TILLER TO GET HIM A GUN. I'LL FURTHER ASK YOU TO ASSUME THAT THIS INDIVIDUAL WHO WE'LL NOW CALL DARREN CALLIER HAD TOLD TILLER THAT IN HIS OPINION HE HAD BEEN PREVIOUSLY MISTREATED BY A HARKER HEIGHTS POLICE OFFICER. AND IN RESPONSE TO THAT HE WAS GOING TO KILL A HARKER HEIGHTS COP. I'LL FURTHER ASK YOU TO ASSUME THAT AFTER PREDICTING THAT HE WOULD KILL A HARKER HEIGHTS COP, HE TOLD TILLER THAT HE TILLER WOULD BE READING ABOUT HIM, THAT BEING DARREN CALLIER, IN THE NEWSPAPERS. I'LL FURTHER ASK YOU TO ASSUME THAT WHILE LIVING IN THIS TRAILER WITH ROBERSON AND TILLER, THERE ALSO LIVED IN THAT TRAILER TWO FEMALES, ONE A PROSTITUTE AND THE OTHER ONE WAS LIVING WITH ROBERT ROBERSON. I'LL ASK YOU TO FURTHER ASSUME THAT ALL OF THESE INDIVIDUALS, THE FIVE OF THEM TOGETHER, BOUGHT, SOLD, PURCHASED AND USED SPEED, THAT BEING METHAMPHETAMINE ON A REGULAR BASIS. EVEN THOUGH POSSESSION OR SALE WOULD CARRY WITH IT A RANGE OF PUNISHMENT FROM TWENTY YEARS ALL THE WAY TO LIFE IN THE PENITENTIARY. I'D ASK YOU TO ASSUME FURTHER THAT DURING MOST OF THE TIME THAT THIS DARREN CALLIER WAS STAYING AT THIS TRAILER, HE HAD NO JOB AND NO VISIBLE

MEANS OF SUPPORT. I'LL FURTHER ASK YOU TO ASSUME THAT THIS DARREN CALLIER WOULD IDLY BOAST ON MANY OCCASIONS THAT HE WAS GOING TO PULL OFF SOME JOBS OR ROBBERIES AND THAT HE WOULD COMMIT THE OFFENSE OF MURDER. I'D ASK YOU TO ASSUME THAT THAT WAS A COMMON THING WITH DARREN CALLIER I'D ASK THAT YOU ASSUME FURTHER THAT ON THE DATE OF AUGUST THE SIXTH OF NINETEEN SEVENTY-EIGHT AT THE TRAILER IN KILLEEN, TEXAS DARREN CALLIER SPECIFICALLY TOLD THE INDIVIDUAL I TOLD YOU IS NAMED TILLER, THAT HE WAS GOING TO ROB A CLUB IN HARKER HEIGHTS, TEXAS AND BEFORE ROBBING THE CLUB HE WAS GOING TO SET FIRE TO A COFFEE SHOP IN HARKER HEIGHTS, TEXAS AS AN EFFORT TO DIVERT THE POLICE FROM THE CLUB THAT HE WAS THEN GOING TO ROB. I'LL THEN ASK YOU TO ASSUME FURTHER THAT ON AUGUST THE SIXTH OF NINETEEN SEVENTY-EIGHT, THAT PERSON, DARREN CALLIER, TOLD TILLER AT THAT TIME THAT IF HE WAS SEEN BY WITNESSES HE WOULD EITHER THEN CHANGE HIS APPEARANCE SO AS NOT TO BE RECOGNIZED LATER OR, IF NECESSARY, HE WOULD KILL THE WITNESS. I'LL THEN ASK YOU TO ASSUME FURTHER THAT ON THE NEXT DAY, AUGUST THE SEVENTH OF NINETEEN SEVENTY-EIGHT, THAT INDIVIDUAL, DARREN CALLIER, HAD ACQUIRED FOR HIMSELF A GUN, A TWENTY-FIVE CALIBER AUTOMATIC AND A BOMB. I'LL ASK YOU TO ASSUME FURTHER THAT HE THEN GOES TO ROBERSON AT THE TRAILER AT AROUND FOUR THIRTY A.M. IN THE MORNING AND TELLS ROBERSON THAT HE WANTS HIM TO GIVE HIM A RIDE

TO HARKER HEIGHTS, TEXAS BECAUSE HE, DARREN CALLIER, DOESN'T HAVE A CAR. HE TELLS ROBERSON AT THAT TIME THAT HE IS GOING TO BLOW UP THE PLACE AND ROB SOMETHING. FURTHER THAT HE TELLS ROBERSON THAT HE MUST DO THIS TO SHOW EVERYBODY THAT HE MEANS WHAT HE SAYS AND THAT THEN HE CAN GO ON TO THE NEXT THING. I'LL ASK YOU TO ASSUME FURTHER THAT HE NEVER SPECIFIES WHAT THE NEXT THING IS. I'LL THEN ASK YOU TO ASSUME THAT WHILE AT THE TRAILER HE TAKES AN EMPTY PLASTIC GALLON MILK JUG AND HE TAKES IT WITH HIM WHEN HE GOES INTO THE CAR. THAT HE THEN TALKS ROBERSON INTO TAKING HIM TO HARKER HEIGHTS, TEXAS. THAT ROBERSON THEN TAKES HIM TO A GAS STATION IN HARKER HEIGHTS, TEXAS AND AT THAT TIME HE BUYS A GALLON OF GAS AND PUTS IT IN THE PLASTIC MILK JUG THAT HE HAS. HE TELLS ROBERSON AT THIS TIME THAT HE NEEDS THE GALLON OF GAS TO IGNITE THE BOMB THAT HE'S GOING TO BLOW UP -- USE TO BLOW UP A CLUB IN HARKER HEIGHTS, TEXAS. I'LL ASK YOU TO ASSUME FURTHER THAT THEN AT THAT TIME MR. ROBERSON TAKES HIM TO A SEVEN ELEVEN IN HARKER HEIGHTS, TEXAS. AND AT THAT TIME THE INDIVIDUAL BY THE NAME OF DARREN CALLIER GETS OUT OF THE CAR, TELLS ROBERSON THAT HE'S GOING TO GO AND BLOW UP A CLUB BY THE NAME OF THE SILVER SPUR IN HARKER HEIGHTS, TEXAS AND THAT INDIVIDUAL, DARREN CALLIER, THEN LEAVES THE CAR. I'LL ASK YOU TO ASSUME FURTHER THAT WHEN HE LEFT THE CAR HE FORGOT AND

LEFT THE BOMB IN THE CAR. I'LL THEN ASK YOU TO ASSUME FURTHER THAT THIS DARREN CALLIER IS NEXT SEEN AT THE SCENE OF THE SILVER SPUR. I'LL ASK YOU TO ASSUME THAT THE SCENE THAT WE'RE TALKING ABOUT WHEN WE TALKING ABOUT THE SILVER SPUR COMPLEX IS RIGHT AROUND A RESIDENTIAL COMMUNITY IN HARKER HEIGHTS, TEXAS. I'LL ASK YOU TO ASSUME FURTHER THAT THIS DARREN CALLIER NEVER MADE ANY MENTION TO ANYBODY TO SHOW THAT HE HAD ANY REGARD WHATSOEVER TO THE INDIVIDUALS OR THE COMMUNITY, THE RESIDENTIAL COMMUNITY THAT SURROUNDED THIS SILVER SPUR COMPLEX AND WHAT MIGHT HAPPEN TO THEM IF THE FIRE BURNED OUT OF CONTROL. I'LL FURTHER THEN ASK YOU TO ASSUME THAT A FIRE DID, IN FACT, OCCUR AT THE SILVER SPUR COMPLEX. THEY FOUND ON TOP OF THE BUILDING AT THE SILVER SPUR COMPLEX A HEAP OF MELTED PLASTIC THAT APPEARED TO BE THE SAME TYPE OF MELTED PLASTIC THAT YOU WOULD IN A GALLON MILK JUG. AND I'LL ASK YOU TO ASSUME FURTHER THAT THE ONLY INDIVIDUAL THAT WAS SEEN THEN LEAVING THE SCENE OF THE FIRE, THAT BEING THE ARSON OF THE SILVER SPUR, WAS THIS SAME DARREN CALLIER. I'D ASK YOU TO ASSUME THAT WHEN HE WAS SEEN BY A THIRD PARTY INDIVIDUAL THERE AT THE SCENE OF THE FIRE THAT THAT INDIVIDUAL WAS IN A CAR AND GOT WITHIN SEVEN AND A HALF YARDS OF DARREN CALLIER AT THE SCENE OF THE FIRE. I WILL THEN FURTHER ASK YOU TO ASSUME THAT DARREN CALLIER HAD AMPLE OPPORTUNITY TO SEE THE

INDIVIDUAL THAT HAD ALREADY SEEN HIM. THE THIRD PARTY THAT WAS IN THE CAR. I'LL THEN ASK YOU TO ASSUME THAT THAT INDIVIDUAL, THAT THIRD PARTY, LEFT THE SCENE OF THE FIRE TO GO EN ROUTE TO THE FIRE DEPARTMENT AND POLICE DEPARTMENT IN HARKER HEIGHTS, TEXAS. I'LL ASK YOU TO ASSUME THAT THE LAST TIME THAT INDIVIDUAL SAW DARREN CALLIER HE WAS RUNNING DOWN A STREET WHICH WE WILL CALL BUSINESS ONE-NINETY AND HE WAS GOING IN A WESTERLY DIRECTION FROM THE SCENE OF THE FIRE. I WILL THEN ASK YOU TO ASSUME THAT AN INDIVIDUAL WHO WAS A POLICE OFFICER BY THE NAME OF CARL LEVIN HAD AN OCCASION TO LEAVE HIS HOME WHICH WAS FURTHER DOWN BUSINESS ONE-NINETY AND PROCEED ON TO THE FIRE. AND I'D ASK YOU TO ASSUME FURTHER THAT CARL LEVIN WAS IN A POLICE CAR THAT WAS OBVIOUSLY MARKED AS A POLICE CAR AS YOU SEE IN STATE'S EXHIBIT NUMBER TWENTY-NINE THAT I HOLD UP. I WOULD ASK YOU THEN TO ASSUME THAT THIS INDIVIDUAL THAT HAD SEEN DARREN CALLIER AT THE FIRE, WENT TO THE POLICE DEPARTMENT AND LEFT THE POLICE DEPARTMENT AND WENT BACK DOWN BUSINESS ONE-NINETY IN AN EASTERLY DIRECTION GOING BACK TOWARDS THE FIRE. I WILL THEN ASK YOU TO ASSUME THAT THIS THIRD PARTY THEN SAW DARREN CALLIER ONCE AGAIN ON BUSINESS ONE-NINETY PROCEEDING IN A WESTERLY DIRECTION. I'LL ASK YOU TO ASSUME THAT ANOTHER POLICE CAR SIMILARLY MARKED TO THE ONE YOU SEE IN STATE'S EXHIBIT NUMBER TWENTY-NINE, WAS

FOLLOWING BEHIND THAT INDIVIDUAL ON BUSINESS ONE-NINETY. I'LL ASK YOU TO ASSUME THAT BY THE TIME THE POLICE CAR GOT TO THE SAME LOCATION WHERE THAT THIRD PARTY HAD SEEN DARREN CALLIER ON ONE-NINETY, HE HAD THEN DISAPPEARED INTO THE DARKNESS. I WILL THEN ASK YOU TO TAKE UP THIS INDIVIDUAL DARREN CALLIER WHERE HE WAS NEXT SEEN AND I WILL ASK YOU TO ASSUME THAT HE WAS NEXT SEEN AT A VACANT HOUSE AROUND FIVE FORTY IN THE MORNING A.M. WHEN IT WAS DARK. AT A VACANT HOUSE IN HARKER HEIGHTS, TEXAS AT THE CORNER OF AMY LANE AND VALLEY ROAD. I WILL ASK YOU TO ASSUME AT THAT TIME HE WAS STOPPED FOR QUESTIONING BY A POLICE OFFICER BY THE NAME OF CARL LEVIN WHO WAS IN A CAR THAT WAS DISTINCTIVELY MARKED AS THE ONE YOU SEE IN STATE'S EXHIBIT NUMBER TWENTY-NINE AND THAT CARL LEVIN WAS WEARING A DISTINCTIVE HARKER HEIGHTS POLICE UNIFORM VERY SIMILAR TO THE ONE THAT YOU CAN SEE OVER HERE IN STATE'S EXHIBIT NUMBER NINE. I WILL THEN ASK YOU TO ASSUME, IF YOU WILL, DOCTOR HOLBROOK, THAT DARREN CALLIER THEN MEETS THE OFFICER AS THE OFFICER STOPS HIS CAR. I'D ASK YOU TO ASSUME THAT THE OFFICER IS HOLDING HIS NOTE PAD IN HIS HAND. HE HAS A GUN STRAPPED TO HIS SIDE THE OFFICER NEVER REACHES FOR THE GUN. I'LL ASK YOU TO ASSUME THAT THE OFFICER IS STANDING THERE TALKING TO DARREN CALLIER AND THAT THE OFFICER MAKES NO MOVEMENT FOR HIS GUN, NO PHYSICAL MOVEMENT TOWARDS DARREN CALLIER

WHATSOEVER. I'D ASK YOU TO ASSUME FURTHER THAT AT THAT POINT IN TIME THAT WITHOUT ANY PROVOCATION FROM THE POLICE OFFICER WHATSOEVER, THAT DARREN CALLIER THEN REACHES IN HIS BACK POCKET, PULLS OUT A TWENTY-FIVE CALIBER AUTOMATIC AND PLACES IT WITHIN THREE TO SIX INCHES OF THE HEAD OF THAT POLICE OFFICER AND PULLS THE TRIGGER. I'LL THEN ASK YOU TO ASSUME THAT THE DIRECTION THAT HE POINTED THAT PISTOL WOULD HAVE BEEN RIGHT TO THE TEMPLE AREA AND I'LL ASK YOU TO ASSUME THAT A PERSON'S BRAIN WOULD BE BEHIND THE TEMPLE AREA. I'LL ASK YOU TO ASSUME THAT HE DID NOT SHOOT THAT OFFICER IN ANY OTHER PLACE EXCEPT THE TEMPLE AREA WHICH WOULD HOUSE THE BRAIN. I'LL FURTHER ASK YOU TO ASSUME THAT IMMEDIATELY AFTER HE SHOOTS THE POLICE OFFICER, HE THEN RUNS FROM THE SCENE. I'LL ASK YOU TO ASSUME THAT HE NEVER DID ANYTHING WHATSOEVER TO CHECK ON THE EXTENT OF INJURIES TO THAT POLICE OFFICER. I'D ASK YOU TO ASSUME FURTHER THAT HE THEN RUNS FROM THE SCENE INTO THE DARKNESS RUNNING DOWN THE STREET AND RUNS DOWN BEHIND PEOPLE'S HOUSES AND FINALLY ENDS UP BACK AT THE TRAILER IN KILLEEN, TEXAS WHERE ROBERSON AND TILLER HAD LIVED. I'D ASK YOU TO ASSUME THAT WHEN HE GETS TO THE TRAILER THAT THIS ROBERSON TELLS HIM THAT THE POLICE ARE LOOKING FOR HIM. I'LL ASK YOU TO ASSUME FURTHER THAT HE RESPONDS, THAT HE KNOWS THE POLICE ARE LOOKING FOR HIM. THAT HE HAD JUST WASTED A COP. AND I'LL ASK YO

TO ASSUME THAT HE USED THOSE WORDS, I'VE WASTED A COP. I'LL FURTHER ASK YOU TO ASSUME THAT HE PHYSICALLY SHOWS ROBERSON HOW HE WASTED THE COP, THAT HE REACHES INTO HIS POCKET, COMES UP WITH HIS FINGER AND POINTS HIS FINGER UP TO THE LEFT TEMPLE OF ROBERT ROBERSON SHOWING HIM HOW HE WASTED THE COP. I'LL THEN ASK YOU TO ASSUME THAT AT THAT TIME HE WASHES UP, WASHES OFF WHAT APPEARED TO BE BLOOD ON HIS PERSON AND HE CHANGES HIS CLOTHES AT THAT TIME IN AN EFFORT TO CHANGE HIS IDENTITY. I'LL ASK YOU TO FURTHER ASSUME THEN THAT HE LEAVES THE TRAILER AND SOMETIME LATER HE THEN CALLS THE INDIVIDUAL WHO I BEFORE TOLD YOU ABOUT WHO WAS NAMED TILLER. I'LL ASK YOU TO ASSUME THAT TILLER AT THAT TIME WAS ON HIS JOB AS A DISPATCHER AT A CAB COMPANY. I'LL ASK YOU TO ASSUME FURTHER THAT WHEN HE WAS TALKING TO TILLER OVER THE PHONE, HE ASKED TILLER IF HE'D BEEN LISTENING TO THE NEWS. AND I'LL ASK YOU TO ASSUME FURTHER THAT TILLER HAD BEEN LISTENING TO THE NEWS AND HEARD ABOUT THE MURDER OF A HARKER HEIGHTS POLICE OFFICER. I'LL ASK YOU TO ASSUME FURTHER THAT TILLER ASKED HIM, DID YOU DO IT? AND I WANT YOU TO ASSUME FURTHER PLEASE THAT DARREN CALLIER RESPONDED WITH THE WORDS, YEAH, I KILLED HIM, I SHOT THE MOTHER FUCKER IN THE HEAD. AND I WANT YOU TO ASSUME THOSE ARE THE EXACT WORDS THAT CAME DOWN. I'LL FURTHER ASK YOU TO ASSUME THAT DARREN CALLIER IS NEXT SEEN IN THE

CITY OF KILLEEN, TEXAS, IN DOWNTOWN KILLEEN. I WILL ASK YOU TO ASSUME THAT WHEN HE IS NEXT SEEN WE'RE TALKING ABOUT A TIME WHICH WOULD BE WITHIN THREE AND HALF HOURS OF THE MURDER. THAT AT THAT TIME HE IS SOBER AND HE MEETS A HOMOSEXUAL IN THE CITY OF KILLEEN. I'D ASK YOU TO ASSUME THAT HE HAD NEVER MET THIS HOMOSEXUAL BEFORE. I WOULD ASK YOU THEN TO ASSUME THAT HE TELLS THIS HOMOSEXUAL THE FOLLOWING STORY. HE TELLS THE HOMOSEXUAL THAT HE HAD JUST LOST HIS JOB AND THAT HE HAD PREVIOUSLY BEEN STAYING AT THE STAR MOTEL IN KILLEEN AND THAT BECAUSE HE LOST HIS JOB HE COULDN'T PAY THE RENT AND WAS KICKED OUT OF THE STAR MOTEL AND NOW HE DIDN'T HAVE A PLACE TO STAY. I'D ASK YOU FURTHER TO ASSUME THAT IN RELIANCE ON WHAT HE WAS JUST TOLD, THE HOMOSEXUAL AGREED TO LET THIS DARREN CALLIER STAY AT HIS PLACE. I'LL ASK YOU TO FURTHER ASSUME THAT ON THE -- THE TIME -- THAT NIGHT THAT FOLLOWED, THAT DARREN CALLIER ATE A FULL MEAL, CONVERSED BACK AND FORTH WITH THE HOMOSEXUAL, DRANK BEER WITH HIM AND NEVER DID ANYTHING WHATSOEVER TO SHOW REMORSE FOR WHAT HAPPENED TO THE POLICE OFFICER AND HE NEVER DID ANYTHING TO EVEN INDICATE THAT HE HAD BEEN INVOLVED IN ANY TYPE OF ACTIVITY, CRIMINAL ACTIVITY PRIOR TO MEETING THE HOMOSEXUAL. I'LL ASK YOU TO FURTHER ASSUME THAT DURING THE CONVERSATION HE DID TELL THE HOMOSEXUAL THAT HIS REAL NAME WAS THOMAS A. BAREFOOT. I'D ASK YOU

TO FURTHER ASSUME THEN THAT THE HOMOSEXUAL THE NEXT MORNING IS LISTENING TO THE NEWS AND HEARS A DESCRIPTION ABOUT -- HEARS FIRST OF ALL FACTS ABOUT THE CAPITAL MURDER THAT OCCURRED IN HARKER HEIGHTS AND THEN HEARS THE DESCRIPTION OF THE SUSPECT. I'LL ASK YOU THEN TO FURTHER ASSUME THAT THIS THOMAS A. BAREFOOT TELLS HIM THAT YES, HE'S THE PERSON THEY'RE LOOKING FOR BUT HE FURTHER TELLS THE HOMOSEXUAL THAT HE DIDN'T DO IT. I'LL THEN ASK YOU IF YOU WILL PLEASE TO ASSUME THAT THE HOMOSEXUAL IS SCARED AND THAT HE TELLS THOMAS A. BAREFOOT THAT HE WILL HELP HAVE HIM DISGUISED AND GET HIM OUT OF TOWN IF HE SO DESIRES. I WILL THEN ASK YOU TO ASSUME THAT THOMAS A. BAREFOOT SHAVES OFF HIS MUSTACHE TO CHANGE HIS IDENTITY AND THEN CHANGES CLOTHES INTO SOME OF THE CLOTHES THAT WERE OWNED BY THE HOMOSEXUAL. I'LL ASK YOU TO ASSUME THAT THOMAS A. BAREFOOT CHOOSES HIS NEXT DESTINATION TO BE HOUSTON, TEXAS. I'LL THEN ASK YOU TO ASSUME THAT THE HOMOSEXUAL AND THOMAS A. BAREFOOT OBTAIN A RIDE TO BELTON, TEXAS WHERE THOMAS A. BAREFOOT PURCHASES A ONE WAY TICKET TO HOUSTON AND HE GETS ON THE GREYHOUND BUS TO GO -- OR KERRVILLE BUS TO GO TO HOUSTON, TEXAS. I'LL FURTHER ASK YOU TO ASSUME THAT ON HIS PERSON AT THAT TIME HE HAS A KNIFE IN ONE POCKET AND A LOADED TWENTY-FIVE CALIBER AUTOMATIC IN THE OTHER POCKET. A ONE WAY TICKET TO HOUSTON, A SMALL AMOUNT OF CHANGE, NO CHANGES OF CLOTHES

NOTHING ELSE WITH HIM WHATSOEVER TO INDICATE THAT HE IS A TRAVELER. HE GETS ON THE BUS EN ROUTE TO HOUSTON AT THAT TIME. I'LL ALSO ASK YOU FURTHER TO ASSUME THAT THE PISTOL THAT HE HAS IN HIS POCKET, HE HAS STRATEGICALLY PLACED BEHIND HIS BILLFOLD SO THAT IF A PERSON LOOKS AT HIM JUST WITH THE NAKED EYE AND SEES HIS POSTERIOR REGION HE WILL SEE ONLY A BILLFOLD PROTRUDING FROM HIS POCKET AND NOT SEE A GUN. I'LL ASK YOU FURTHER TO ASSUME THAT THE GUN IS IN A LOCATION THAT IF HE IS PATTED DOWN ONLY THE BILLFOLD WILL BE FELT. YOU'D HAVE TO HAVE A FULL BLOWN SEARCH OF HIS PERSON TO FIND THE WEAPON THAT WE'RE TALKING ABOUT. I'LL FURTHER ASK YOU TO ASSUME THAT IN HOUSTON, TEXAS WHEN HE ARRIVES HE IS ARRESTED BY FIVE DIFFERENT OFFICERS AND THAT ON HIS PERSON IS FOUND THE KNIFE AND THE GUN THAT I PREVIOUSLY TOLD YOU ABOUT. I WOULD FURTHER ASK YOU TO ASSUME THAT WHEN HE IS TRANSPORTED FROM HOUSTON ALL THE WAY TO BELL COUNTY, HE SLEEPS IN THE BACK OF THE PATROL CAR ON HIS WAY TO BELL COUNTY TEXAS. I'LL FURTHER ASK YOU TO ASSUME THAT THIS INDIVIDUAL IS THEN CHARGED WITH CAPITAL MURDER, TRIED FOR CAPITAL MURDER AND CONVICTED BY A JURY OF THE OFFENSE OF CAPITAL MURDER OF THAT HARKER HEIGHTS POLICE OFFICER IN BELL COUNTY, TEXAS. NOW, WITH ALL OF THAT BEFORE YOU, DOCTOR HOLBROOK, I WOULD ASK YOU IF THAT WOULD BE SUFFICIENT FACTS FOR YOU THEN TO LOOK AT AND TO FORM AN EXPERT

PSYCHIATRIC OPINION AS TO WHAT TYPE OF CHARACTER TRAITS THAT INDIVIDUAL HAS EXHIBITED DURING THAT PERIOD OF LIFE THAT I HAVE JUST TOLD YOU ABOUT?

MR. BROWN: YOUR HONOR, BEFORE THE WITNESS ANSWERS THE QUESTION I WOULD LIKE TO INTERPOSE AN OBJECTION. I WOULD LIKE TO OBJECT TO THE HYPOTHETICAL QUESTION ASKED BY THIS WITNESS ON THE BASIS THAT IT ASSUMES ONLY AGGRAVATING FACTS, THAT IT ASSUMES NO MITIGATING FACTS THAT HAVE BEEN BROUGHT OUT DURING THE COURSE OF THE TRIAL. THAT IT FURTHER ASSUMES FACTS THAT HAVE BEEN CONTROVERTED BY THE EVIDENCE THAT IN SOME CASES IT ASSUMES WHAT WAS GOING ON IN THE MIND OF PERSONS INVOLVED WHICH FACTS ARE FACTS NOT IN EVIDENCE AT ALL. THAT THERE IS NO WAY THAT A HYPOTHETICAL CAN BE GENERATED WHICH WOULD INCORPORATE ALL THE FACTS WHICH HAVE COME BEFORE THIS JURY OR WHICH WOULD INCORPORATE WHAT THIS JURY HAS DETERMINED TO BE TRUE AND WHAT THIS JURY HAS DETERMINED TO BE UNTRUE. FOR THAT REASON WE WOULD OBJECT TO THE HYPOTHETICAL QUESTION PRESENTED TO THIS WITNESS.

THE COURT: OVERRULED.

Q DO YOU REMEMBER MY QUESTION, DOCTOR HOLBROOK?

A I THINK YOU ASKED ME IF IN VIEW OF THE DATA YOU PRESENTED I WOULD HAVE AN OPINION THAT I COULD FORM FROM THAT DATA.

Q YES, SIR. WOULD YOU HAVE SUFFICIENT DATA IN FRONT OF YOU IF YOU WOULD ASSUME ALL THAT DATA TO BE TRUE?

A YES, I BELIEVE SO.

Q AND TELL THIS JURY WHAT THAT OPINION WOULD BE PLEASE.

A WELL, IT WOULD BE A NUMBER OF THINGS. YOU MEAN WITHOUT HAVING ANY SPECIFIC OPINION BUT IN GENERAL WHAT THAT DATA INDICATES TO ME ABOUT THAT PERSON?

Q DOCTOR HOLBROOK, I WOULD LEAVE THAT UP TO YOU AS TO WHAT YOU CAN TELL THIS JURY ABOUT THAT INDIVIDUAL BASED ON ALL THE FACTS AND CIRCUMSTANCES THAT I GAVE TO YOU IN THE HYPOTHETICAL QUESTION.

A ASSUMING ALL OF THOSE DATA TO BE ACCURATE, I THINK THE FIRST THING THAT BECOMES OBVIOUS FROM THE DATA IS THAT WE HAVE AN INDIVIDUAL WHO HAS ESTABLISHED WHAT IS CALLED A BAD REPUTATION AS A LAW ABIDING CITIZEN, PEACE LOVING CITIZEN. IN SOMETHING IN THE ORDER OF TEN OR TWELVE COMMUNITIES, PLUS OR MINUS A FEW, IN FIVE STATES WHICH IS APPROXIMATELY A TENTH OF THE WHOLE CONTINENTAL AREA OF THE UNITED STATES. HE'S BEEN UNABLE TO ESTABLISH ANY SORT OF NORMAL KIND OF RELATIONSHIP TO SOCIETY BUT WHO HAS DONE JUST THE CONTRARY IN THAT MAGNITUDE. STARTING AS FAR AS BACK AS NINETEEN SIXTY-NINE WHICH -- WE'RE MOVING UP ON TEN YEARS AT THIS POINT. OVER THAT PERIOD OF TIME THIS KIND OF ANTISOCIAL OR LACK OF ABILITY TO ADAPT TO SOCIETY AND NOT ONLY THAT TO MORE

OR LESS REJECT IT. TO NOT INDICATE IN SOME WAY BEHAVIOR-
ALLY AT LEAST WHETHER WE KNOW WHAT'S GOING ON IN HIS MIND
OR NOT, THAT THEY'RE CAPABLE OF RELATING TO ANY OF THE
NORMAL INSTITUTIONS THAT MOST PEOPLE LIVE BY. EITHER
RELIGION, SCIENCE OR POLITICAL SCIENCE, CHURCH, FAMILY
OR WHATEVER. AND NONE OF THESE KINDS OF LOYALTIES SEEM
TO APPEAR WITH THAT HISTORY. FURTHER THEN THAT WE HAVE
IN THIS HISTORY THAT IS RELATED TO ME AN INDICATION OF
AN ASCENDING SORT OF SCALE OF CRIMINAL BEHAVIOR IN THAT
THE INDIVIDUAL HAS BEEN ARRESTED A NUMBER OF TIMES FOR
A VARIETY OF CHARGES STARTING WITH RELATIVELY MINOR
CHARGES OF POSSESSION OF MARIJUANA AS I UNDERSTAND IT,
PROGRESSING TO POSSESSION AND EVEN DISTRIBUTION OF
AMPHETAMINES, THEN MOVING TO THE ELEMENT OF ADDING DAN-
GER TO CRIMINAL BEHAVIOR OR POSSESSION OF AN ILLEGAL
WEAPON AND THEN A CONCEALED WEAPON. THERE IS A PROGRES-
SION OF THIS PERSON ACTUALLY HAVING BEEN CONFINED AND
ATTEMPTED TO CORRECT THIS KIND OF BEHAVIOR AT LEAST ON
TWO OCCASIONS AND INDICATE THAT THAT HAD NO EFFECT ON
THIS BEHAVIOR. THAT IT CONTINUED AND ACCELERATED
THROUGHOUT TIME. WE SEE THIS PERSON BEING VERY MOBILE,
MOVING IN THE CONFINES OF FIVE STATES THAT WE KNOW ABOUT
-- PROBABLY -- WELL, I WON'T SAY THAT. AT LEAST FIVE
STATES THAT WE KNOW ABOUT AND A NUMBER OF COMMUNITIES
THAT WE KNOW ABOUT. THIS PERSON ALSO HAS BY HISTORY OF

THIS REPORT CONTRIVED TO DO TWO THINGS. TO REMAIN RELATIVELY ANONYMOUS BY TAKING UP AN ALIAS WHEN IT IS CONVENIENT TO DO SO. FURTHER THE INDIVIDUAL HAS USED THAT IN SUCH A WAY TO SERVE THEIR OWN PURPOSES. ALMOST EVERYTHING THAT IS REPORTED HERE INDICATES THAT NOT MUCH BEHAVIOR AT LEAST BY HISTORY THIS PERSON HAS DONE TO SERVE PURPOSES FOR ANYONE OTHER THAN THEMSELVES. SO THE INDICATORS ARE THIS IS EXTREMELY SELF SERVING PURPOSE -- PERSON. HE TENDS TO DISREGARD THE NORMAL VALUES OF SOCIAL LIFE WITH THIS ASCENDING SCALE MAINTAINING ANONYMITY AND TAKING ON AN ALIAS, TO DO THAT AND MAINTAINING CONSIDERABLE MOBILITY. IN THE LATTER STAGES OF THE HISTORY THE INDIVIDUAL HAS CONTINUED TO ASSOCIATE THEMSELVES WITH PEOPLE WHO WOULD PERPETUATE THAT ANONYMITY AND WOULD EVEN BY SOME MANIPULATION ON THEIR PART PROVIDE THEM WITH TRANSPORTATION, FOOD, LODGING, WITHOUT ANY REAL EFFORT ON THAT PERSON'S PART. ASSUMING THAT ALL OF THE PLANNING THAT WENT INTO THIS AND THE WAY IT'S STATED, THERE ARE INDICATORS THAT THE INDIVIDUAL REALLY HAD IN MIND TO COMMIT A VERY SERIOUS OFFENSE AND WAS INTENT UPON DOING THAT BY HISTORY. THIS HAS BEEN REPORTED WELL IN THE BOOK CALLED THE CRIMINAL PERSONALITY AND PROFILE FOR CHANGE BY YOKELMAN (PHONETIC) FROM SAINT ELIZABETH'S HOSPITAL IN WASHINGTON, D.C. WHICH IS A NET RESULT OF ABOUT EIGHTEEN YEARS WORK OF THEIR

SEPARATE LIFE REPRESENTS THIRTY-SIX YEARS OF THEIR COLLECTIVE LIFE. THEY THREW AWAY ABOUT THREE HUNDRED THOUSAND PAGES OF DATA GIVEN TO THEM BY INDIVIDUALS THAT THEY HAD EVALUATED THERE WHICH IS A CRIMINAL EVALUATION CENTER AND BEGAN TO GO UPON BASIC DATA AS THIS SORT OF THING, INFORMATION GIVEN BY FAMILY AND THE INDIVIDUAL SEEMED TO BE WORTHLESS AND A QUARTER MILLION PAGES OF IT WERE THROWN AWAY AFTER TWELVE YEARS. THE KIND OF INFORMATION HERE SHOWS WHAT I HAVE SAID THUS FAR. THE PLANNING INDICATES WHAT THEY FOUND AND WHAT I HAVE FOUND OVER ALMOST TWENTY YEARS, THAT IN THE MIND OF THE CRIMINAL WHATEVER YOU WANT TO CALL IT, THEY OPERATE ON THE BASIS OF THREE THINGS -- FOUR REALLY. THAT THEY HAVE A PECULIAR CRIMINAL MIND. THAT EACH OFFENSE THEY COMMIT HAS BEEN THOUGHT OF MANY TIMES. THE ONLY THING THEY NEED IS THE OPPORTUNITY TOGETHER WITH A TARGET AND ANONYMITY AND MOBILITY. THEY WILL INVARIABLY PROVIDE THOSE ELEMENTS IF THEY ARE VERY ACTIVELY ENGAGED IN CRIMINAL THINKING. THIS GOES ON AND ON. THIS IS MANIFEST IN THE HISTORY THAT YOU GIVE. IN THE REPORT OF THE INDIVIDUAL ACTUALLY SORT OF BRAGGING ABOUT AN OFFENSE OF A VERY SERIOUS NATURE INDICATES THAT THE PERSON DERIVED A GREAT DEAL OF PERSONAL PLEASURE. THERE CERTAINLY WAS NO GAIN AS FAR AS I COULD DETERMINE FROM THIS DATA. THIS FITS MY OWN EXPERIENCE IN DEALING WITH THE CRIMINAL, WHATEVER

YOU WANT TO CALL THEM DIAGNOSTICALLY. THAT THE PRIMARY GOAL OF THE CRIMINAL IS THE EXCITEMENT AND THE EGO ENHANCING PART OF CRIMINAL BEHAVIOR AND WHEN THIS BEGINS TO HAVE AN ASCENDING KIND OF ORDER BOTH IN FREQUENCY AND IN SERIOUSNESS AND INVOLVING MORE AND MORE DANGER, THAT THER IS NO END POINT OTHER THAN THE ULTIMATE OF DANGER TO OTHE PEOPLE AND/OR THEMSELVES. SO ALL THOSE ELEMENTS ARE PRESENT. THIS IS AN INVARIABLE SET OF CIRCUMSTANCES AND IT'S BORN OUT BY VERY GOOD EVIDENCE AND THESE PEOPLE WROTE THREE VOLUNES ON THE SUBJECT AND I MADE A CONTRIBUTION OF MY OWN. IN REVIEWING THE LITERATURE ON THE SUBJECT MOST AUTHORS WHO ARE THINKING STRAIGHT AND YOU THINK NOW OF YOKELMAN REVIEWED THAT AND IT'S AVAILABLE --

MR. BROWN: YOUR HONOR, WE WOULD OBJECT TO -- STATEMENTS REGARDING WHAT OTHER PEOPLE HAVE SAID THAT ARE NOT AVAILABLE FOR CROSS EXAMINATION AS BEING HEARSAY AND WE ALSO ASK THAT IF THE STATE HAS PARTICULAR QUESTION I THINK THE DOCTOR HAS AMPLY STATED HIS OPINION AS TO WHAT CHARACTERISTICS HE FEELS LIKE THIS HAS. I FEEL LIKE A QUESTION AND ANSWER STATEMENT CAN BE -- A NARRATIVE CAN BE TAKEN UP HERE.

THE COURT: SUSTAINED.

A WITHOUT BELABORING THAT MY OPINION AGREES WITH ALL OF THAT.

Q LET ME ASK YOU ONE QUESTION, PLEASE, DOCTOR HOLBROOK.

A YES.

Q THE OPINION THAT YOU HAVE JUST NOW GIVEN TO US, WAS THAT OPINION BASED WITHIN A REASONABLE PSYCHIATRIC CERTAINTY?

A YES.

Q IF YOU WILL PLEASE, DOCTOR HOLBROOK, I'D ASK YOU, COULD YOU TELL US WITHIN A REASONABLE PSYCHIATRY CERTAINTY WHAT TYPE OF BEHAVIOR WAS EXHIBITED BY THAT INDIVIDUAL IN THE HYPOTHETICAL WHO WAS NAMED THOMAS BAREFOOT AND HAD AN ALIAS OF DARREN CALLIER?

A WELL, THIS IS NORMALLY REFERRED TO AS THE BEHAVIOR OF A CRIMINAL SOCIOPATH. WHETHER YOU WANT TO PUT THE LABEL SOCIOPATH ON THERE OR NOT, IT IS AN INHERENT SET OF CRIMINAL BEHAVIORS THAT INVARIABLY REMAIN THE SAME AND ACCELERATE. IN CONVENTIONAL PSYCHIATRIC TERMS YOU WOULD REFER TO THIS AS THE CRIMINAL SOCIOPATH. THE FACT THAT THE SOCIOPATH DIAGNOSIS THERE IS NOT PARTICULARLY SIGNIFICANT IN THAT THERE ARE SOCIOPATHS IN ALL WALKS OF LIFE. IT JUST HAPPENS TO BE MANIFEST IN THIS CRIMINAL ELEMENT ALSO.

Q CAN YOU TELL US WHAT THE ELEMENTS ARE IF YOU CAN OF A CRIMINAL SOCIOPATH?

A YES. THE ELEMENTS ARE ESSENTIALLY THE SAME IN MOST SOCIOPATHS. THE CRIMINAL SOCIOPATH INVOLVES CRIMINAL

BEHAVIOR. THE ELEMENTS ARE NORMALLY BY MOST AUTHORS INCLUDING MYSELF, SUGGEST THAT THE INDIVIDUAL IS NUMBER ONE, ONE WHO CONTINUES TO DEMONSTRATE FROM EARLY LIFE INTO ADULTHOOD ANTISOCIAL BEHAVIOR AND IN THE CRIMINAL IT'S CRIMINAL ANTISOCIAL BEHAVIOR. THESE ARE ACTS THAT ARE NOT ARRESTABLE TO ARRESTABLE KINDS OF BEHAVIOR. THE PERSON IS NORMALLY EXTREMELY SELF CENTERED AND SELF-SERVING. THEY DO THOSE THINGS WHICH SERVE THEIR OWN PURPOSES WITHOUT REGARD FOR ANY CONSEQUENCES OR OUTCOMES TO OTHER PEOPLE. OTHER PEOPLE ARE JUST NOT IMPORTANT TO THEM. THEY DO NOT FORM LOYALTIES TO THE NORMAL INSTITUTIONS SUCH AS FAMILY, FRIENDS, POLITICS, LAW, RELIGION OR ANY INSTITUTION THAT MOST PEOPLE TEND TO LIVE BY TO A LARGE DEGREE FOR THE MOST PART. THEY TEND TO USE OTHER PEOPLE THROUGH LYING AND MANIPULATION, TO SERVE THEIR OWN PURPOSES AND THEY BECOME QUITE ADEQUATE AT THIS AS INDICATED IN THIS HYPOTHETICAL WHERE AN ALIAS IS USED WITH SOMEBODY THAT WOULD TAKE HIM IN OFF THE STREET AND TELL HIM NOTHING AND THIS WAS ALL BELIEVEABLE UNTIL THIS PERSON HEARD IT ON THE RADIO AND THEN HE HAD SOME QUESTIONS MAYBE, I DON'T KNOW. BUT IN ANY CASE IT WAS ALL QUITE BELIEVEABLE TO HIM. HE WAS TAKEN IN ON TWO OCCASIONS ASSUMING ALL THIS WAS CORRECT BY MANIPULATING AND TELLING STORIES THAT WOULD BE REASONABLE AND SOUND GOOD. THIS IS CHARACTERISTIC OF THIS KIND OF PERSON. DURING

THAT TIME OTHER SORTS OF ANTISOCIAL CRIMINAL BEHAVIORS ARE OCCURRING. THE SOCIOPATH ALSO FINDS PLEASURE IN CONTROLLING AND EXERCISING POWER OVER OTHER PEOPLE THROUGH MANIPULATION. THIS SEEMS TO BE THEIR MAJOR THRUST AND ULTIMATELY THIS STRUGGLE FOR POWER AND ENHANCING THEIR OWN EGO IMAGE SUCH AS THAT, HOW TERRIBLE THAT MAY BE TO THE AVERAGE PERSON, IT MAKES THEM FEEL GOOD. SO WE HAVE HERE PROBABLY SIX OR SEVEN MAJOR CRITERIAS FOR THE SOCIOPATH IN THE CRIMINAL AREA WITHIN REASONABLE MEDICAL CERTAINTY. MOST AUTHORS ACCEPT SOMEWHERE BETWEEN FIVE AND FIFTEEN. WE MIGHT ADD ANOTHER ONE HERE AND THAT IS USUALLY IN THE HISTORY OF THIS INDIVIDUAL YOU WILL FIND SOME INDICATOR OF VIOLENCE OR SERIOUS THREATS OF VIOLENCE WHICH, IF TAKEN ALONE, MAY NOT BE SIGNIFICANT BUT IF TAKEN IN THIS HISTORY AND THE CONTEXT OF THIS PERSON'S LIFE, ONE MIGHT BEGIN TO TAKE IT VERY SERIOUSLY. ANOTHER THING THAT MIGHT BE MENTIONED HERE IS ANOTHER CRITERIA AND I THINK WE'RE UP TO AROUND SEVEN OR EIGHT NOW, WOULD BE, THE PERSON ESCAPING OR RUNNING AWAY FROM AUTHORITY OR BEING UNWILLING TO ACCEPT A CONFRONTATION IN THE LEGAL WAY IN A COURT OF LAW. THE RUN AWAY OR ESCAPE IS USUALLY A PART OF THE HISTORY. TRUANCY VERY OFTEN WHEN THEY ARE YOUNG OR IT MAY, IN FACT, BE PRESENT IN THE CORRECTIONAL SENSE OR THE LEGAL SENSE WHERE A FUGITIV OR A PERSON WHO HAD BECOME A FUGITIVE AND RUN AWAY FROM

EVEN THAT BASIC RESPONSIBILITY. IN SUMMARY THOSE ARE THE CHARACTERISTICS OF THE CRIMINAL SOCIOPATH IN MY VIEW AND MANY, MANY OTHER PEOPLE.

Q DO YOU KNOW OF ANY TREATMENT THAT CAN BE GIVEN A PERSON SUCH AS THE THOMAS ANDREW BAREFOOT THAT YOU HEARD ABOUT IN THE HYPOTHETICAL THAT WOULD MAKE HIM CHANGE HIS PERSONALITY AND BEHAVIOR FROM THAT OF BEING A CRIMINAL SOCIOPATH?

A NOT AT THIS TIME, I DO NOT.

Q IS THERE A LIKELIHOOD THAT THIS THOMAS ANDREW BAREFOOT PERSONALITY AND BEHAVIOR WILL CHANGE FOR THE BETTER WITHIN THE NEXT FEW YEARS?

A IN MY OPINION IT WILL NOT CHANGE.

Q IT WILL NOT CHANGE ONE WAY OR THE OTHER?

A IT MAY BECOME ACCELERATED, I WOULD ANTICIPATE.

Q IF YOU WOULD ASSUME THE FACTS THAT I HAVE GIVEN YOU IN THE HYPOTHETICAL AS TRUE, CAN YOU TELL US WHETHER OR NOT YOU HAVE AN OPINION WITHIN REASONABLE PSYCHIATRIC CERTAINTY AS TO WHETHER OR NOT THERE IS A PROBABILITY THAT THE THOMAS A. BAREFOOT IN THAT HYPOTHETICAL WILL COMMIT CRIMINAL ACTS OF VIOLENCE IN THE FUTURE THAT WOULD CONSTITUTE A CONTINUING THREAT TO SOCIETY?

MR. BROWN: YOUR HONOR, BEFORE THE WITNESS ANSWERS THAT QUESTION, WE WOULD OBJECT TO THE EXPRESSION OF AN OPINION BY THE DOCTOR ON THIS QUESTION ON THE GROUN

THAT IT ALLOWS HIM TO DEFINE LEGAL TERMS AND DEFINITIONS THAT ARE CONTAINED IN THE STATUTES OF THIS STATE.

THE COURT: OVERRULED.

A IN MY OPINION HE WILL.

Q WOULD THAT OPINION CHANGE IF WE WERE TALKING ABOUT THE SOCIETY WITHIN THE TEXAS DEPARTMENT OF CORRECTIONS AS OPPOSED TO THE SOCIETY OF BELL COUNTY, TEXAS?

A IT WOULD NOT.

MR. LEITNER: I PASS THE WITNESS AT THIS TIME, YOUR HONOR.

CROSS EXAMINATION BY MR. BROWN

MR. BROWN: MAY IT PLEASE THE COURT.

THE COURT: YES, SIR.

Q ALRIGHT, DOCTOR, YOU STATED IT'S TRUE YOU NEVER EXAMINED THE DEFENDANT, IS THAT RIGHT?

A THAT'S CORRECT.

Q YOU'VE NEVER HAD HIM UNDER ANY KIND OF CLINICAL STUDY NEVER HAD THE OPPORTUNITY TO ASK HIM ANY QUESTIONS OR NEVER OBSERVED HIM BEFORE YOU CAME IN THE COURTROOM TODAY

A I HAVE NOT.

Q IS IT TRUE THAT YOU HAVE NEVER SEEN THIS DEFENDANT BEFORE TODAY?

A THAT IS TRUE.

Q AND YOU HAVE NOT BEEN PRESENT DURING THE COURSE OF THIS TRIAL HAVE YOU, SIR?

A I HAVE NOT.

Q AND YOU HAVE NOT HEARD THE WITNESSES WHO HAD TAKEN THE STAND AND TESTIFIED AND PRESENTED EVIDENCE IN THIS CASE, HAVE YOU, SIR?

A I HAVE NOT.

Q AND SO YOU DO NOT KNOW WHAT PORTION OF THE EVIDENCE THAT WAS PRESENTED TO THIS JURY THE JURY CHOSE TO BELIEVE AND WHAT PORTION OF THE EVIDENCE THE JURY CHOSE NOT TO BELIEVE. IS THAT CORRECT?

A I DO NOT.

Q AND YOU HAVE NOT HAD THE OPPORTUNITY TO JUDGE THE CREDIBILITY OF THE WITNESSES ON YOUR OWN, IS THAT RIGHT, SIR?

A I HAVE NOT.

Q ARE YOU A MEMBER OF THE AMERICAN PSYCHIATRIC ASSOCIATION?

A YES, I AM.

Q AND I TAKE IT THEN THAT YOU ARE FAMILIAR WITH THE AMERICAN PSYCHIATRIC ASSOCIATION TASK FORCE REPORT DATED JULY, NINETEEN SEVENTY-FOUR RELATING TO THE CLINICAL ASPECTS OF THE VIOLENT INDIVIDUAL?

A YES, SIR.

Q IS IT NOT TRUE THAT IT IS THE POSITION OF THE AMERICAN PSYCHIATRIC ASSOCIATION, NOT NECESSARILY ALL THE MEMBERS OF THE ASSOCIATION BUT JUST THE GENERAL BODY, AND A

CONSENSUS OF THE TASK FORCE OF THAT BODY THAT NEITHER PSYCHIATRISTS NOR ANYONE ELSE HAS RELIABLY DEMONSTRATED THE ABILITY TO PREDICT FUTURE VIOLENCE OF DANGEROUSNESS?

A THAT'S MY UNDERSTANDING OF THAT REPORT, YES, SIR.

Q IS IT ALSO NOT TRUE THAT IT IS THE POSITION OF THE AMERICAN PSYCHIATRIC ASSOCIATION THAT PSYCHIATRIC EXPERTISE IN THE PREDICTION OF DANGEROUSNESS IS NOT ESTABLISHED AND THAT CLINICIANS SHOULD AVOID CONCLUSIONARY JUDGMENTS IN THAT REGARD?

A POSITION OF THE PARENT BODY NOT THE PSYCHIATRISTS MEMBERSHIP.

Q AS A STATED SUBJECT IN THE BODY OF LITERATURE BY OTHER PSYCHIATRISTS IN THIS COUNTRY WHICH DISAGREE WITH YOUR POSITION THAT YOU CAN PREDICT FUTURE BEHAVIOR WITH REASONABLE MEDICAL CERTAINTY?

A SUBSTANTIAL BODY ON BOTH SIDES, YES.

Q NOW YOU INDICATED THAT YOU HAVE GIVEN -- YOU HAVE TESTIFIED IN CASES BOTH FOR THE STATE AND FOR THE DEFENSE. IS THAT RIGHT, SIR?

A WELL, I'VE HELD OPINIONS THAT EACH OF THEM MAY HAVE THOUGHT FAVORABLE.

Q NOW, I ASSUME THAT IN OTHER SITUATIONS YOU HAVE ALSO ANSWERED HYPOTHETICAL QUESTIONS THAT ARE PRESENTED IN THE FORM THE STATE HAS PRESENTED THE QUESTION IN THIS CASE?

A YES, I HAVE.

Q AND IF SOME OF THE ASSUMPTIONS IN THE STATE'S HYPOTHETICAL QUESTION WERE NOT TRUE, WOULD THAT EFFECT YOUR OPINION ON THE STATE'S HYPOTHETICAL QUESTION?

A YES, IT WOULD.

Q LET ME ASK YOU, SIR. YOU TESTIFIED FOR THE DEFENSE IN THE CULLEN DAVIS CASE, DID YOU NOT, SIR?

A I TESTIFIED AND HELD AN OPINION IN THE BOND HEARING IN THAT CASE.

Q AND IT WAS YOUR OPINION THAT IF CULLEN DAVIS WAS RELEASED ON BOND THAT THERE WAS NO PROBABILITY THAT SAID CULLEN DAVIS WOULD COMMIT A CRIMINAL ACTS OF VIOLENCE IN THE FUTURE THAT WOULD CONSTITUTE A CONTINUING THREAT TO SOCIETY. IS THAT RIGHT, SIR?

A THAT'S CORRECT.

MR. BROWN: I'LL PASS THE WITNESS.

MR. LEITNER: I'LL PASS THE WITNESS, YOUR HONOR.

THE COURT: MAY THIS WITNESS BE EXCUSED?

MR. BROWN: YES, YOUR HONOR.

MR. EADS: YES.

A AM I EXCUSED, JUDGE?

THE COURT: YES, SIR, YOU'RE EXCUSED. THANK YOU VERY MUCH DOCTOR HOLBROOK. LET'S TAKE A RECESS FOR ABOUT TEN MINUTES. LADIES AND GENTLEMEN OF THE JURY,

BEAR IN MIND THE INSTRUCTIONS. DO NOT DISCUSS THE CASE AMONG YOURSELVES OR PERMIT ANYONE TO DISCUSS IT WITH YOU OR IN YOUR PRESENCE. WE'LL BE IN RECESS FOR TEN MINUTES.

BE IT REMEMBERED AFTER A SHORT RECESS WITH ALL PARTIES AGAIN PRESENT IN OPEN COURT, THE FOLLOWING PROCEEDINGS WERE HAD, TO-WIT:

IN THE PRESENCE OF THE JURY

JAMES P. GRIGSON

WAS CALLED AS A WITNESS, WAS DULY SWORN, AND WAS EXAMINED AND UPON EXAMINTION TESTIFIED AS FOLLOWS, TO-WIT:

DIRECT EXAMINATION BY MR. EADS

THE COURT: YOU MAY PROCEED.

Q WOULD YOU STATE YOUR NAME AND YOUR OCCUPATION FOR THE RECORD, PLEASE, SIR?

A JAMES P. GRIGSON. I'M A MEDICAL DOCTOR. I SPECIALIZE IN PSYCHIATRY. I'M SELF EMPLOYED.

Q AND WHERE DO YOU LIVE DOCTOR GRIGSON?

A DALLAS, TEXAS.

Q HOW LONG HAVE YOU LIVED AND PRACTICED PSYCHIATRY IN DALLAS, TEXAS?

A I'VE LIVED IN DALLAS SINCE NINETEEN FIFTY-FOUR. I'VE PRACTICED PSYCHIATRY SINCE NINETEEN -- JULY NINETEEN SIXTY.

Q DOCTOR GRIGSON, FOR THE BENEFIT OF THE JURY AND FOR THE COURT, PLEASE SIR, WOULD YOU GIVE THEM THE BENEIFT

OF YOUR EDUCATIONAL BACKGROUND AND YOUR EXPERIENCE IN TH FIELD OF PSYCHIATRY?

A YES, SIR. I OBTAINED MY M.D. DEGREE FROM SOUTHWESTERN MEDICAL SCHOOL BRANCH OF THE UNIVERSITY OF TEXAS LOCATED IN DALLAS. I SERVED ONE YEAR IN A ROTATING INTERNSHIP AT THE BAYLOR MEDICAL CENTER IN DALLAS. AT THE END OF THAT TIME I DECIDED TO GO AHEAD AND SPECIALIZE IN PSYCHIATRY. I SPENT THE NEXT THREE YEARS IN AN APPROVED PSYCHIATRIC RESIDENCY TRAINING PROGRAM. THIS WAS DIVIDED THERE WAS EIGHTEEN MONTHS AT TIMBERLAWN HOSPITAL IN DALLA AND EIGHTEEN MONTHS AT PARKLAND HOSPITAL IN DALLAS. I WAS CHIEF PSYCHIATRY RESIDENT DURING MY THIRD YEAR AT PARKLAND. AFTER I COMPLETED THE REQUIRED THREE YEARS OF TRAINING I WENT INTO FULL TIME TEACHING IN THE DEPARTMENT OF PSYCHIATRY AT THE MEDICAL SCHOOL THERE. I TAUGHT FULL TIME FOR FOUR AND A HALF YEARS. DURING THAT PERIOD OF TIME I WAS ALSO A CONSULTANT TO THE TERRELL STATE HOSPITAL SYSTEM FOR TWO YEARS. I WAS CONSULTANT TO TEXAS WOMEN'S UNIVERSITY HEALTH CENTER FOR TWO YEARS. I WAS CONSULTANT TO THE DALLAS COUNTY HEALTH DEPARTMENT FOR THREE YEARS. I'VE BEEN OUT IN PRIVATE PRACTICE NOW ABOUT TWELVE YEARS. I CONTINUE TO TEACH AT THE MEDICAL SCHOOL IN THE DEPARTMENT OF PSYCHIATRY, HOWEVER, IT IS ON A LIMITED BASIS NOW. I AM CERTIFIED BY THE AMERICAN BOARD OF NEUROLOGY AND PSYCHIATRY. MY LICENSE TO PRACTICE

MEDICINE IN THE STATE OF TEXAS IS ON FILE IN DALLAS COUNTY.

Q DOCTOR GRIGSON, WOULD YOU STATE FOR THE JURY PLEASE, SIR, APPROXIMATELY HOW MANY PSYCHIATRIC EXAMINATIONS YOU HAD OCCASION TO PERFORM SINCE YOU HAVE BEEN LICENSED TO PRACTICE MEDICINE IN THE STATE OF TEXAS?

A SINCE I GOT INTO PSYCHIATRY I'VE EXAMINED SOMEWHERE BETWEEN THIRTY AND FORTY THOUSAND INDIVIDUALS.

Q WOULD YOU STATE WHETHER OR NOT YOU'VE EVER HAD AN OCCASION TO GIVE A PSYCHIATRIC EXAMINATION TO ANYBODY WHO HAS BEEN CHARGED WITH THE OFFENSE OF MURDER IN THE STATE OF TEXAS?

A YES, SIR. I'VE EXAMINED OVER EIGHT THOUSAND INDIVIDUALS THAT ARE CHARGED WITH FELONY TYPE OFFENSES AND OH, SOMEWHERE BETWEEN THREE AND FOUR HUNDRED, MAYBE A LITTLE BIT MORE INDIVIDUALS THAT WERE CHARGED WITH MURDER.

Q DOCTOR GRIGSON, WOULD YOU STATE WHETHER OR NOT YOU HAVE EVER TESTIFIED IN A COURT OF LAW AS TO YOUR PSYCHIATRIC OPINION REGARDING SOMEONE'S PARTICULAR PERSONALITY MAKEUP IN A CRIMINAL TRIAL IN THE STATE OF TEXAS?

A YES, SIR, I HAVE.

Q WOULD YOU STATE WHETHER OR NOT THIS HAS BEEN AT THE REQUEST OF THE STATE OF TEXAS OR THE COURT OR THE DEFENSE

A YES, SIR. IT'S BEEN AT THE REQUEST OF VARIOUS

DISTRICT ATTORNEYS OFFICES, DEFENSE ATTORNEYS AND ON OCCASION THE JUDGE OF A PARTICULAR COURT.

Q IT IS MY UNDERSTANDING, HOWEVER, DOCTOR GRIGSON, THA YOU HAVE TESTIFIED ON BEHALF AND HAVE BEEN CALLED AS A WITNESS BY DEFENSE IN THE STATE OF TEXAS?

A YES, SIR, I HAVE BEEN.

Q DOCTOR GRIGSON, I WILL DIRECT YOUR ATTENTION SPECIFICALLY TO THE DEFENDANT IN THIS CASE, THE INDIVIDUAL BY THE NAME OF THOMAS ANDREW BAREFOOT. HE IS THE GENTLEMAN SITTING OVER HERE AT THE END OF THE TABLE WITH THE PLAID SHIRT ON. I WILL ASK YOU WHETHER OR NOT YOU KNOW THIS INDIVIDUAL SITTING OVER HERE, SIR?

A I'VE ONLY SEEN HIM TODAY. I'VE NEVER EXAMINED MR. BAREFOOT, I'VE SIMPLY SEEN HIM HERE IN COURT.

Q WOULD YOU STATE WHETHER OR NOT, DOCTOR GRIGSON, THAT WITHOUT A MEDICAL OR WITHOUT A PSYCHIATRIC EXAMINATION OF AN INDIVIDUAL, WHETHER OR NOT YOU ARE ABLE TO GIVE A MEDICAL OPINION WITHIN REASONABLE PSYCHIATRIC CERTAINTY AS TO THE PSYCHOLOGICAL OR PSYCHIATRIC MAKEUP OF AN INDIVIDUAL PROVIDED YOU ARE GIVEN SUFFICIENT FACTS, INFORMATION AND CIRCUMSTANCES WITHOUT ACTUALLY HAVING INTERVIEWED AND TALKED TO THAT PARTICULAR INDIVIDUAL?

A IF YOU GIVE ME ENOUGH INFORMATION, ENOUGH FACTS, YES, I CAN.

Q DOCTOR GRIGSON, WOULD YOU STATE WHETHER OR NOT THERE

ARE CATEGORIES OR PERSONALTY CATEGORIES WITHIN THE FIELD OF PSYCHIATRY INTO WHICH MOST PEOPLE, MOST LAYMEN WOULD FALL INTO ONE WAY OR THE OTHER?

A YES, SIR, THERE PROBABLY ARE.

Q WOULD YOU STATE WHETHER OR NOT THAT THE FIELD OF PSYCHIATRY IN THE CLASSIFICATION OF INDIVIDUALS AS TO THEIR PARTICULAR PERSONALITY MAKEUP WOULD BE THAT PARTICUALR DESCRIPTION WOULD BE PARTICULAR TO THE FIELD OF PSYCHIAT AND NOT TO THE AVERAGE LAYMAN?

A YES, THAT'S TRUE.

Q WILL YOU STATE WHETHER OR NOT THAT THIS WOULD BE BASED ALSO UPON YOUR EDUCATION AND ALSO UPON YOUR EXPERIENCE AS A PSYCHIATRIST?

A YES, SIR, IT IS.

Q DOCTOR GRIGSON, I'M GOING TO GIVE YOU A HYPOTHETICAL QUESTION AND IT IS QUITE LENGTHY. I'LL JUST ASK YOU IF YOU WOULD SIT BACK AND RELAX AND LISTEN TO THIS PARTICULAR QUESTION AND AT THE END OF THE HYPOTHETICAL QUESTION WHICH I WILL GIVE YOU, AT THAT TIME I WILL THEN ASK YOU WHETHER OR NOT YOU FEEL LIKE THERE ARE SUFFICIENT FACTS AND CIRCUMSTANCES PRESENTED TO YOU TO WHERE YOU AS A PSYCHIATRIST COULD RENDER A MEDICAL OPINION TO WITHIN A REASONABLE PSYCHIATRIC CERTAINTY AS TO THE TYPE OF PERSONALITY AND INDIVIDUAL THAT WE ARE DEALING WITH. DOCTOR GRIGSON, I'M GOING TO ASK THAT YOU ASSUME THAT ALL

THE FACTS IN THE HYPOTHETICAL SITUATION THAT I GIVE YOU ARE TRUE. DOCTOR GRIGSON, I WILL ASK YOU TO ASSUME THAT THOMAS A. BAREFOOT WHO WAS CONVICTED ON THE TWENTY-FOURTH DAY OF OCTOBER, NINETEEN SEVENTY-FIVE IN THE WESTERN DISTRICT COURT OF THE WESTERN DISTRICT OF OKLAHOMA FOR THE OFFENSE OF THE POSSESSION OF AN UNREGISTERED FIREARM AND THAT HIS PUNISHMENT WAS ASSESSED AT ONE YEAR IN PRISON. I WOULD ASK YOU TO FURTHER ASSUME THAT THOMAS A. BAREFOOT WAS CONVICTED ON THE SECOND DAY OF DECEMBER, NINETEEN SEVENTY-FOUR IN THE FIFTEENTH DISTRICT COURT OF LAFAYETTE PARISH, LOUISIANA FOR THE OFFENSE OF DISTRIBUTION OF MARIJUANA AND HIS PUNISHMENT WAS ASSESSED AT FIVE YEARS IN PRISON AT HARD LABOR PROBATED AND ONE YEAR IN THE PARISH JAIL. FURTHER ASSUMING THOMAS A. BAREFOOT WAS CONVICTED ON THE SECOND DAY OF DECEMBER, NINETEEN SEVENTY-FOUR IN THE FIFTEENTH DISTRICT COURT OF LAFAYETTE PARISH, LOUISIANA FOR THE OFFENSE OF POSSESSION OF AMPHETAMINES AND HIS PUNISHMENT WAS ASSESSED AT FIVE YEARS IN PRISON AT HARD LABOR PROBATED AND ONE YEAR IN THE PARISH JAIL. I WOULD LIKE FOR YOU TO FURTHER ASSUME THAT THOMAS A. BAREFOOT WAS CONVICTED ON THE TWENTY-SIXTH DAY OF NOVEMBER, NINETEEN SEVENTY-FOUR IN THE FIFTEENTH DISTRICT COURT OF LAFAYETTE PARISH, LOUISIANA FOR THE OFFENSE OF CARRYING A CONCEALED WEAPON AND HIS PUNISHMENT WAS ASSESSED AT SIX MONTHS IN THE PARISH JAIL. AND

FURTHER ASSUME THAT THOMAS A. BAREFOOT WAS CONVICTED ON THE TWENTY-SIXTH DAY OF NOVEMBER, NINETEEN SEVENTY-FOUR IN THE FIFTEENTH DISTRICT COURT OF LAFAYETTE PARISH, LOUISIANA FOR THE OFFENSE OF POSSESSION OF MARIJUANA AND THAT HIS PUNISHMENT WAS ASSESSED AT SIX MONTHS IN THE PARISH JAIL. I WANT YOU TO FURTHER ASSUME THAT THOMAS A. BAREFOOT RESIDED IN MORGAN CITY, LOUISIANA IN NINETEEN SIXTY-NINE. HE HAD A BAD REPUTATION FOR PEACEFUL AND LAW ABIDING CITIZENSHIP. THAT WHEN THOMAS A. BAREFOOT RESIDED IN NEW IBERIA, LOUISIANA, IN NINETEEN SEVENTY-TWO HE HAD A BAD REPUTATION FOR BEING PEACEFUL AND LAW ABIDING CITIZENSHIP. THAT WHEN THOMAS A. BAREFOOT RESIDED IN LAFAYETTE, LOUISIANA, IN NINETEEN SEVENTY-THREE HE HAD A BAD REPUTATION FOR PEACEFUL AND LAW ABIDING CITIZENSHIP. THAT WHEN THOMAS A. BAREFOOT RESIDED IN OKLAHOMA CITY, OKLAHOMA IN NINETEEN SEVENTY-FIVE HE HAD A BAD REPUTATION FOR PEACEFUL AND LAW ABIDING CITIZENSHIP. THAT WHEN THOMAS A. BAREFOOT RESIDED IN ODESSA, TEXAS IN NINETEEN SEVENTY-SIX HE HAD A BAD REPUTATION FOR PEACEFUL AND LAW ABIDING CITIZENSHIP. THAT WHEN THOMAS A. BAREFOOT RESIDED IN WOODWARD, OKLAHOMA IN NINETEEN SEVENTY-SEVEN HE HAD A BAD REPUTATION FOR PEACEFUL AND LAW ABIDING CITIZENSHIP. THAT WHEN THOMAS A. BAREFOOT RESIDED IN NEODESHA, KANSAS IN NINETEEN SEVENTY-SEVEN HE HAD A BAD REPUTATION FOR PEACEFUL AND LAW ABIDING

CITIZENSHIP. THAT WHEN THOMAS A. BAREFOOT RESIDED IN VALENCIA COUNTY, NEW MEXICO IN NINETEEN SEVENTY-SEVEN AND NINETEEN SEVENTY-EIGHT THAT HE HAD A BAD REPUTATION FOR PEACEFUL AND LAW ABIDING CITIZENSHIP. I'LL THEN NOW LIKE TO DISCUSS THE CENTRAL TEXAS AREA OF TEXAS AND MORE SPECIFICALLY THE CITY OF HARKER HEIGHTS AND KILLEEN, TEXA

I'D LIKE FOR YOU TO FURTHER ASSUME THAT IN JUNE OF NINETEEN SEVENTY-EIGHT THAT THOMAS A. BAREFOOT MET AN INDIVIDUAL IN A PUBLIC RESTAURANT IN KILLEEN, TEXAS DURING A PROPOSED NARCOTICS TRANSACTION AND THAT SUBSEQUENT TO THAT MEETING THOMAS A. BAREFOOT MOVED INTO THAT INDIVIDUAL'S TRAILER WITH THAT INDIVIDUAL AND ONE OTHER. ASSUME FURTHER THAT THE DEFENDANT TOLD THE TWO INDIVIDUAL WHOSE TRAILER HE HAD MOVED INTO AN UNTRUE STORY AS TO WHY HE NEEDED A PLACE TO STAY AND FURTHER HE WAS GOING TO MOVE INTO THE TRAILER FOR ONLY A SHORT PERIOD OF TIME. ASSUME FURTHER THAT THE TWO INDIVIDUALS TRAILER INTO WHICH HE MOVED WAS BEING PAID FOR BY THE TWO INDIVIDUALS BUT THAT THE DEFENDANT, THOMAS BAREFOOT, PAID NO RENT FOR THE USE OF THE TRAILER AND A FEW DAYS TURNED INTO A FEW MONTHS OCCUPATION OF THE TRAILER. ASSUME FURTHER THAT IMMEDIATELY UPON MOVING INTO THE TRAILER THE DEFENDANT, THOMAS ANDREW BAREFOOT, STARTED MAKING INQUIRIES AND REQUESTS OF THE INDIVIDUALS WITH WHOM HE LIVED AS TO HOW HE COULD OBTAIN A GUN. ASSUME FURTHER THERE WERE

NUMEROUS DISCUSSIONS AND CONVERSATIONS FROM THE TIME THEY MOVED INTO THE TRAILER IN JUNE OF NINETEEN SEVENTY-EIGHT CONCERNING THE DEFENDANT, THOMAS ANDREW BAREFOOT, DESIRE TO PULL ROBBERIES. ASSUME FURTHER THAT THOMAS A. BAREFOOT USED DRUGS DURING THIS PERIOD OF TIME ALONG WITH THE OTHER INDIVIDUALS WHO LIVED AND STAYED IN THE TRAILER AND MANY TIMES USED THE DRUGS WHICH WERE FURNISHED BY THE OTHER INDIVIDUALS. ASSUME FURTHER THAT THE DEFENDANT, THOMAS A. BAREFOOT, DID NOT HAVE STEADY EMPLOYMENT AND WAS, IN FACT, UNEMPLOYED ALMOST THE ENTIRE TIME HE STAYED THERE AT THE TRAILER. ASSUME FURTHER THAT THOMAS ANDREW BAREFOOT DID NOT HAVE A VEHICLE AND THE TWO INDIVIDUALS WITH WHOM HE WAS LIVING DROVE HIM TO THE PLACES THAT HE WANTED TO GO. ASSUME FURTHER THAT IN ADDITION TO NUMEROUS DISCUSSIONS REGARDING THE DEFENDANT'S DESIRE TO COMMIT ROBBERIES AND HIS REQUEST THAT HE OBTAIN A WEAPON, THAT THE DEFENDANT, THOMAS ANDREW BAREFOOT, HAD DISCUSSED WITH ONE OF THE INDIVIDUALS THE FACT THAT HE WAS GOING TO KILL A COP AND THAT PEOPLE WOULD BE READING ABOUT HIM IN THE NEWSPAPER. ASSUME FURTHER THAT ON OR ABOUT THE FOURTH DAY OF AUGUST, NINETEEN SEVENTY-EIGHT, THOMAS ANDREW BAREFOOT HAD A CONVERSATION WITH ONE OF THE INDIVIDUALS IN WHICH HE STATED THAT HE WAS GOING TO ROB A BUSINESS IN HARKER HEIGHTS, TEXAS AND THAT HIS PLANS FOR THE ROBBERY INCLUDED SETTING FIRE TO

ANOTHER BUILDING TO CREATE A DIVERSION FOR THE POLICE WHILE THE ROBBERY WAS BEING COMMITTED. ASSUME FURTHER THAT THE DEFENDANT TOLD THE INDIVIDUAL HOW HE PLANNED ON CUTTING HIS HAIR AND SHAVING HIS MUSTACHE TO CHANGE HIS APPEARANCE SO HE WOULD NOT BE RECOGNIZED OR CAUGHT AFTER THE ROBBERY OCCURRED AND WAS PREPARED TO KILL ANYONE WHO MIGHT RECOGNIZE HIM. ASSUME FURTHER THAT ON THE PREDAWN HOURS OF AUGUST THE SEVENTH, NINETEEN SEVENTY-EIGHT AT APPROXIMATELY FOUR THIRTY A.M. THOMAS ANDREW BAREFOOT ENTERED THE TRAILER WHERE HE WAS STAYING AND REQUESTED TO SPEAK TO ONE OF THE INDIVIDUALS STAYING AT THE TRAILER REGARDING HIS INTENTIONS TO ROB A BUSINESS IN HARKER HEIGHTS, TEXAS AND AT THE SAME TIME TO BLOW UP AND SET FIRE TO ANOTHER BUSINESS TO CREATE A DIVERSION WHILE HE WAS ROBBING THE OTHER ONE. ASSUME FURTHER THAT DURING THE CONVERSATION REGARDING THE ROBBING OF ONE BUSINESS AND THE BLOWING UP OF THE OTHER, THE DEFENDANT, THOMAS ANDREW BAREFOOT, EXHIBITED TO THE INDIVIDUAL AT THE TRAILER, A HOMEMADE BOMB AND A TWENTY-FIVE CALIBER SEMI-AUTOMATIC BARETTA PISTOL WITH A FULLY LOADED CLIP. ASSUME FURTHER THAT THOMAS ANDREW BAREFOOT REQUESTED THE INDIVIDUAL TO TAKE HIM TO HARKER HEIGHTS, TEXAS AT THAT TIME OF THE MORNING SO THAT HE COULD CARRY OUT HIS PLANNED ROBBERY AND ARSON. ASSUME FURTHER THAT THE INDIVIDUAL DID TAKE THOMAS ANDREW BAREFOOT TO HARKER HEIGHTS, TEXAS

IN THE EARLY PREDAWN HOURS OF AUGUST THE SEVENTH, NINE TEEN SEVENTY-EIGHT BUT THAT BEFORE LEAVING THE TRAILER THE DEFENDANT, THOMAS ANDREW BAREFOOT, GOT A GALLON MIL JUG AND TOLD THE INDIVIDUAL THAT HE HAD TO HAVE IT FIL WITH GASOLINE IN ORDER TO CARRY OUT THE ARSON. ASSUM FURTHER THAT THE DEFENDANT, THOMAS ANDREW BAREFOOT, GOT THE GALLON MILK JUG FROM THE TRAILER, THAT THE INDIVIDU WITH WHOM HE WAS STAYING TOOK THE DEFENDANT, THOMAS ANDREW BAREFOOT, WHO AT THAT TIME WAS ARMED WITH A FULL LOADED TWENTY-FIVE CALIBER SEMIAUTOMATIC BARETTA PISTOL ALONG WITH A GALLON MILK JUG AND A BOMB TO THE CITY OF HARKER HEIGHTS, TEXAS. AND ASSUME FURTHER THAT THE DE- FENDANT, THOMAS ANDREW BAREFOOT, HAD TO HAVE THE INDIVI- DUAL TAKE HIM BECAUSE THOMAS ANDREW BAREFOOT DID NOT HAVE AN AUTOMOBILE OF HIS OWN. ASSUME FURTHER THAT THE INDIVIDUAL WITH WHOM HE WAS STAYING AT THE TRAILER TOOK HIM TO THE CONVENIENCE STORE IN HARKER HEIGHTS AT WHICH TIME THE GALLON MILK JUG WAS FILLED WITH GASOLINE WHICH WAS TO BE USED IN THE ARSON. AND ASSUME FURTHER THAT TH INDIVIDUAL WHO TOOK HIM TO HARKER HEIGHTS, TEXAS AND ASKED HIM WHY HE WAS GOING -- AND ASKED HIM WHY HE WAS GOING TO COMMIT THE ROBBERY AND THE ARSON AND THOMAS ANDREW BAREFOOT TOLD HIM THAT HE HAD SOMETHING TO PROVE TO SOME PEOPLE AND TO PROVE THAT HE WASN'T FOOLING AROUND ASSUME FURTHER THAT THE INDIVIDUAL LET THOMAS ANDREW

BAREFOOT OUT OF THE AUTOMOBILE AT A SEVEN-ELEVEN STORE IN THE EARLY PREDAWN HOURS OF AUGUST THE SEVENTH, NINETEEN SEVENTY-EIGHT IN HARKER HEIGHTS, TEXAS, APPROXIMATE TWO BLOCKS FROM THE BUILDING WHICH THE DEFENDANT PLANNED ON SETTING FIRE TO AND LEFT THE DEFENDANT, THOMAS ANDREW BAREFOOT AT THAT SPOT AND RETURNED TO THE TRAILER. I WOULD LIKE FOR YOU TO FURTHER ASSUME THAT THE BUSINESS COMPLEX WHICH THOMAS ANDREW BAREFOOT SAID HE WAS GOING TO SET FIRE TO WAS, IN FACT, SET FIRE TO ONLY MINUTES THEREAFTER AND THAT THE FIRE DEPARTMENT AND THE POLICE DEPARTMENT WERE CALLED TO THE SCENE. ASSUME FURTHER THAT THE DEFENDANT WAS SEEN AT THE SCENE OF THE FIRE AND OBSERVED TRAVELING ON FOOT IN A DIRECTION TOWARDS THE TRAILER FROM WHICH HE HAD BEEN TAKEN. ASSUME FURTHER THAT AS THE RESULT OF A PRIVATE CITIZEN SEEING THE DEFENDANT IN THE LOCATION OF THE FIRE, THAT THE POLICE OFFICER ON DUTY WITH THE HARKER HEIGHTS POLICE DEPARTMENT IMMEDIATELY STARTED TO SEARCH THE AREA FOR THE PERSON FITTING THE DESCRIPTION OF THE DEFENDANT. ASSUME FURTHER THAT DEFENDANT, THOMAS ANDREW BAREFOOT, WAS STOPPED BY AN ON DUTY POLICE OFFICER BY THE NAME OF CARL IRVIN LEVIN ON A CITY STREET IN HARKER HEIGHTS, TEXAS AND THAT THE LOCATION IN WHICH OFFICER LEVIN SAW THE DEFENDANT WAS IN AN AREA WHICH WAS CONSISTENT WITH A ROUTE OF TRAVEL OF RETURNING FROM THE SCENE OF THE FIRE TO THE TRAILER.

ASSUME FURTHER THAT AS OFFICER LEVIN BROUGHT HIS POLICE VEHICLE TO A STOP ON THE CITY STREET OF HARKER HEIGHTS, TEXAS AND GOT OUT OF HIS VEHICLE, THAT THE DEFENDANT, THOMAS ANDREW BAREFOOT, APPROACHED THE POLICE OFFICER'S VEHICLE WHICH HAD THE SPOTLIGHT ON AND WAS A CLEARLY DISTINGUISHABLE POLICE VEHICLE. ASSUME FURTHER THAT THE POLICE VEHICLE WAS ONE OF COMMON USEAGE WITH THE EMBLEM OF THE CITY OF HARKER HEIGHTS ON THE DOOR OF THE CAR AND THE WORDS, HARKER HEIGHTS POLICE WERE CLEARLY MARKED ON THE POLICE VEHICLE. ASSUME FURTHER THAT OFFICER CARL LEVIN WAS DRESSED IN A POLICE UNIFORM WHICH WAS LIGHT BLUE AND DARK BLUE IN COLOR AND THAT OFFICER LEVIN HAD A CITY OF HARKER HEIGHTS POLICE BADGE ON HIS CHEST AND FURTHER THAT OFFICER LEVIN HAD HIS SERVICE REVOLVER IN HIS HOLSTER ON HIS SIDE. ASSUME FURTHER THAT WHEN THE DEFENDANT, THOMAS ANDREW BAREFOOT, GOT WITHIN THREE OR FOUR FEET OF OFFICER CARL IRVIN LEVIN, THAT THOMAS ANDREW BAREFOOT PULLED A GUN FROM HIS POCKET, POINTED IT TO THE HEAD OF CARL LEVIN AND PULLED THE TRIGGER CAUSING A BULLET FROM THE GUN TO ENTER THE BRAIN OF CARL LEVIN FROM A DISTANCE OF NO MORE THAN SIX INCHES. ASSUME FURTHER THAT THERE WAS ABSOLUTELY NO PROVOCATION WHATSOEVER ON THE PART OF OFFICER CARL IRVIN LEVIN PRIOR TO THE TIME THE DEFENDANT, THOMAS ANDREW BAREFOOT, POINTED THE GUN TO THE HEAD OF CARL LEVIN AND SHOT HIM ON THE

CITY STREETS OF HARKER HEIGHTS, TEXAS. AND THAT OFFICER LEVIN WAS FOUND LAYING IN THE STREET NEXT TO HIS PATROL CAR WITH HIS POLICE REVOLVER STILL IN IT'S HOLSTER AND SNAPPED SHUT. ASSUME FURTHER THAT WHEN THOMAS A. BAREFOOT MURDERED CARL LEVIN BY SHOOTING HIM IN THE HEAD WIT A GUN, THAT THOMAS A. BAREFOOT WAS AT THAT VERY TIME ALREADY A FUGITIVE FROM JUSTICE. ASSUME FURTHER THAT THOMAS ANDREW BAREFOOT'S NAME HAD BEEN ENTERED INTO THE NATIONAL CRIMINAL INFORMATION CENTER IN WASHINGTON, D.C. FOR ESCAPING FROM JAIL IN VALENCIA COUNTY, NEW MEXICO ON JANUARY THE NINETEENTH, NINETEEN SEVENTY-EIGHT. ASSUME FURTHER THAT THE DEFENDANT, THOMAS ANDREW BAREFOOT, WAS AT THE TIME OF THE ESCAPE FROM THE VALENCIA COUNTY JAIL IN VALENCIA COUNTY, NEW MEXICO, UNDER INDICTMENT FROM THE VALENCIA COUNTY GRAND JURY CHARGING THOMAS ANDREW BAREFOOT FOR THE FOLLOWING CHARGES. COUNT ONE THAT THE DEFENDANT INTENTIONALLY AND UNLAWFULLY ENGAGED IN VAGINAL SEXUAL INTERCOURSE WITH A MINOR CHILD UNDER THE AGE OF THIRTEEN YEARS OLD NOT THEN HIS SPOUSE. COUNT TWO THAT THE DEFENDANT INTENTIONALLY AND UNLAWFULLY ENGAGED IN THE ANAL SEXUAL INTERCOURSE OF A MINOR CHILD UNDER THE AGE OF THIRTEEN YEARS OLD WHICH WAS NOT HIS SPOUSE. COUNT THREE THAT THE DEFENDANT UNLAWFULLY RESTRAINED AND CONFINED A MINOR CHILD BY USE OF FORCE OR DECEPTION WITH THE INTENT TO COMMIT CRIMINAL SEXUAL

PENETRATION AGAINST THE CHILD'S WILL. ASSUME FURTHER THAT THE DEFENDANT WAS SCHEDULED TO GO TO TRIAL IN VALENCIA COUNTY, NEW MEXICO ON THE ABOVE CHARGES AND THAT THE DEFENDANT, THOMAS A. BAREFOOT, ESCAPED FROM JAIL ONLY A SHORT TIME PRIOR TO HIS TRIAL. ASSUME FURTHER THAT THE DEFENDANT ESCAPED FROM THE VALENCIA COUNTY JAIL WITH ANOTHER INMATE BY DIGGING A HOLE IN THE FLOOR OF HIS CELL AND ENTERING A VACANT CELL NEXT TO HIS AND HIS FELLOW INMATES AND COMPLETED HIS ESCAPE BY CUTTING THE COMMUNICATION WIRES OF THE JAIL IN WHICH HE WAS INCARCERATED. ASSUME FURTHER THAT THE LAW ENFORCEMENT OFFICIALS OF VALENCIA COUNTY, NEW MEXICO AND THE ATTORNE REPRESENTING THE DEFENDANT, THOMAS ANDREW BAREFOOT, IN VALENCIA COUNTY, NEW MEXICO HAD NOT SEEN THE DEFENDANT SINCE HIS SUCCESSFUL ESCAPE FROM JAIL WHILE AWAITING TRIAL FOR RAPE OF A CHILD UNTIL THE TRIAL FOR THE KILLING OF OFFICER CARL LEVIN. ASSUME FURTHER THAT THE DEFENDANT, THOMAS ANDREW BAREFOOT, DID NOTHING TO ASSIST THE FALLEN OFFICER AFTER HE HAD SHOT HIM IN THE HEAD AND ALTHOUGH THE OFFICER HAD A FAINT PULSE IMMEDIATELY AFTER THE SHOOTING, THAT THE OFFICER WAS PRONOUNCED DEAD FROM A GUN SHOT WOUND AS HE LAY IN THE STREET THERE IN HARKER HEIGHTS, TEXAS. ASSUME FURTHER THAT AT THE TIME OF THE SHOOTING OF OFFICER CARL LEVIN WAS APPROXIMATELY FIVE FORTY-SIX A.M. IN THE PREDAWN HOURS OF AUGUST THE SEVENTH

NINETEEN SEVENTY-EIGHT. ASSUME FURTHER THAT IMMEDIATELY AFTER SHOOTING OFFICER LEVIN IN THE HEAD THAT THE DEFENDANT, THOMAS ANDREW BAREFOOT, RAN FROM THE SCENE IN THE GENERAL DIRECTION OF THE TRAILER WHICH HE HAD LEFT EARLI THAT MORNING. ASSUME FURTHER THAT THE DEFENDANT, THOMAS ANDREW BAREFOOT, THEN RETURNED TO THE TRAILER FROM WHICH HE HAD LEFT AT APPROXIMATELY FOUR THIRTY A.M. AND WOKE UP THE INDIVIDUAL WHO HAD ORIGINALLY TAKEN HIM TO HARKER HEIGHTS TO COMMIT THE OFFENSE OF ROBBERY AND ARSON. ASSUME FURTHER THAT THOMAS ANDREW BAREFOOT TOLD THE INDIVIDUAL THAT HE HAD KILLED THE POLICE OFFICER AND STATED TO THE INDIVIDUAL THAT HE HAD WASTED A COP AND TOOK HIS FINGER AND POINTED TO THE HEAD OF THE INDIVIDUAL AND SHOWED THE INDIVIDUAL EXACTLY HOW HE'D DONE IT. ASSUME FURTHER THAT THOMAS ANDREW BAREFOOT THEN WASHED UP, CHANGED CLOTHES AND ASKED THE INDIVIDUAL AT THE TRAILER TO GIVE HIM A RIDE. ASSUME FURTHER THAT THE INDIVIDUAL AT THE TRAILER REFUSED TO TAKE HIM ANYWHERE, THAT THOMAS ANDREW BAREFOOT THEN LEFT THE TRAILER ON HIS OWN DURING THE DAYLIGHT HOURS OF AUGUST THE SEVENTH, NINETEEN SEVENT EIGHT. ASSUME FURTHER THAT AT APPROXIMATELY TEN FORTY-FIVE A.M. ON THE SAME MORNING, THAT BEING THE MORNING OF AUGUST THE SEVENTH, NINETEEN SEVENTY-EIGHT OR APPROXIMATELY FIVE HOURS AFTER THE MURDER, THAT THOMAS ANDREW BAREFOOT CALLED THE SECOND INDIVIDUAL WITH WHOM HE HAD

BEEN LIVING AT THE TRAILER AND ASKED HIM WHETHER OR NOT HE HAD BEEN LISTENING TO THE NEWS. ASSUME FURTHER THAT THE INDIVIDUAL TO WHOM HE MADE THE PHONE CALL ADVISED HIM THAT HE HAD AND THAT THOMAS ANDREW BAREFOOT, AFTER BEING ASKED WHETHER OR NOT HE HAD SHOT THE POLICE OFFICER TOLD THE INDIVIDUAL ON THE TELEPHONE THAT HE SHOT THE MOTHER FUCKER IN THE HEAD. ASSUME FURTHER THAT THE DEFENDANT, THOMAS ANDREW BAREFOOT, TOLD THE INDIVIDUAL THAT HE WOULD CALL HIM BACK LATER BUT THAT HE NEVER DID. ASSUME FURTHER THAT THOMAS ANDREW BAREFOOT ON THE SAME MORNING OF AUGUST THE SEVENTH, NINETEEN SEVENTY-EIGHT IN DOWNTOWN KILLEEN, TEXAS MET A STRANGER ON THE STREET AND ASSUME FURTHER THAT THE STRANGER STARTED A CASUAL CONVERSATION WITH THOMAS ANDREW BAREFOOT AND THAT THE STRANGER WAS A HOMOSEXUAL AND THAT HE INFORMED THOMAS ANDREW BAREFOOT OF THAT FACT AND THAT AS A RESULT OF THE CONVERSATION BETWEEN THE HOMOSEXUAL AND THOMAS ANDREW BAREFOOT, THAT THE HOMOSEXUAL AND THE DEFENDANT THEN AGREED TO GO TO THE GROCERY STORE TO BUY SOME FOOD AND THAT THE HOMOSEXUAL FIXED THE DEFENDANT'S LUNCH. ASSUME FURTHER THAT THOMAS ANDREW BAREFOOT TOLD THE HOMOSEXUAL THAT THE REASON HE WAS ON THE STREETS OF DOWNTOWN KILLEEN WAS THAT HE HAD BEEN KICKED OUT OF HIS MOTEL ROOM AND DIDN'T HAVE ANY PLACE TO STAY AND THAT THAT FACT WAS TOTALLY UNTRUE JUST AS THE STORY WAS UNTRUE THAT HE HAD ORIGINALLY TOLD THE

INDIVIDUAL WITH WHOM HE HAD MOVED INTO THE TRAILER WITH IN THE EARLIER PART OF THE SUMMER. ASSUME FURTHER THAT AT THE TIME THE HOMOSEXUAL MET THOMAS ANDREW BAREFOOT IN DOWNTOWN KILLEEN, TEXAS ON THE MORNING OF AUGUST THE SEVENTH, NINETEEN SEVENTY-EIGHT THAT THE DEFENDANT, THOMAS ANDREW BAREFOOT WAS IN A SOBER CONDITION AND WAS NOT IN ANY WAY ACTING UNUSUAL OR THAT ANYTHING WAS BOTHERING HIM OR UPSETTING HIM IN THE OPINION OF THE HOMOSEXUAL. ASSUME FURTHER THAT THE HOMOSEXUAL AND THAT THOMAS ANDREW BAREFOOT THEN WENT TO THE APARTMENT OF THE HOMOSEXUAL WHERE THE HOMOSEXUAL THEN FIXED DINNER FOR THOMAS ANDREW BAREFOOT AND THAT THOMAS ANDREW BAREFOOT ATE A FULL MEAL AND SPENT THE REMAINDER OF THE AFTERNOON SLEEPING AT THE HOMOSEXUAL'S APARTMENT NEVER INDICATING THAT ANYTHING WAS WRONG WITH HIM OR THAT ANYTHING WAS BOTHERING HIM. ASSUME FURTHER THAT THOMAS ANDREW BAREFOOT SPENT THE REMAINDER OF THE DAY AND EVENING WITH THE HOMOSEXUAL DURING WHICH TIME THEY DRANK BEER AND AT NO TIME WAS THE KILLING OF THE OFFICER IN HARKER HEIGHTS, TEXAS, CARL IRVIN LEVIN, EVER MENTIONED OR AT ANY TIME DID THE DEFENDANT APPEAR TO BE UPSET OR THAT ANYTHING WAS BOTHERING HIM. ASSUME FURTHER THAT THE DEFENDANT THEN SPENT THE NIGHT WITH THE HOMOSEXUAL AT THE HOMOSEXUAL'S APARTMENT BUT REJECTED THE HOMOSEXUAL'S ADVANCES ASSUME FURTHER THAT THE NEXT MORNING THE HOMOSEXUAL HEARD

THE NEWS OF THE KILLING OF THE POLICE OFFICER AND WAS TOLD BY THE DEFENDANT THAT HE WAS THE ONE THE POLICE WERE LOOKING FOR BUT THAT HE DIDN'T DO IT. ASSUME FURTHER THEN THAT THE DEFENDANT SHAVED OFF HIS MUSTACHE AT THE HOMOSEXUAL'S APARTMENT AND BORROWED SOME OF THE HOMOSEXUALS CLOTHES AND DISCUSSED WITH THE HOMOSEXUAL THE AID OF THE HOMOSEXUAL IN HELPING GET HIM TO ANOTHER CITY. ASSUME FUTHER THAT THE HOMOSEXUAL BECAME VERY FRIGHTENED OF THOMAS ANDREW BAREFOOT AND AGREED TO HELP HIM GO TO ANOTHER CITY. ASSUME FURTHER THAT THE HOMOSEXUAL WENT WITH THOMAS ANDREW BAREFOOT TO THE CITY OF BELTON, TEXAS AT WHICH TIME THE DEFENDANT PURCHASED A ONE WAY BUS TICKET TO THE CITY OF HOUSTON, TEXAS AND HAD NO LUGGAGE OR OTHER EVIDENCE OF AN INTENT TO RETURN TO THE AREA. ASSUME FURTHER THAT THOMAS ANDREW BAREFOOT HAD ON HIS PERSON AT THAT TIME THE TWENTY-FIVE CALIBER BARETTA PISTOL WHICH HE USED TO SHOOT OFFICER CARL LEVIN IN THE HEAD WITH THE DAY BEFORE. ASSUME FURTHER THAT THE INDIVIDUAL BOARDED A BUS AND WENT TO THE CITY OF HOUSTON, TEXAS AND WAS SUBSEQUENTLY ARRESTED BY MEMBERS OF THE HOUSTON POLICE DEPARTMENT OF HOMICIDE DIVISION AND MEMBERS OF THE TEXAS RANGERS AS A RESULT OF THE INFORMATION THAT HAD BEEN GIVEN TO THE AUSTIN POLICE DEPARTMENT BY THE HOMOSEXUAL AFTER THE DEFENDANT HAD GOTTEN ON THE BUS. ASSUME FURTHER THAT UPON TRANSPORTING THE DEFENDANT BACK

TO THE CITY OF BELTON, TEXAS BY MEMBERS OF THE SHERIFF'S OFFICE OF BELL COUNTY, THAT THE DEFENDANT SLEPT THE ENTIRE WAY BACK TO THE CITY OF BELTON, TEXAS.

I WOULD ASK YOU, DOCTOR GRIGSON, WHETHER OR NOT BASED UPON THE HYPOTHETICAL SITUATION I HAVE JUST GIVEN YOU, WHETHER OR NOT YOU FEEL THAT THOSE ARE SUFFICIENT FACTS AND CONTAIN SUFFICIENT INFORMATION UPON WHICH YOU CAN BASE A MEDICAL SOUND TESTIMONY WITHIN REASONABLE PSYCHIATRIC CERTAINTY AS TO THE TYPE OF INDIVIDUAL WHICH THOMAS ANDREW BAREFOOT WAS THROUGHOUT THE DATES AND ON THE DAY IN QUESTION THAT I HAVE JUST SET FORTH TO YOU?

MR. BROWN: YOUR HONOR, BEFORE THE WITNESS ANSWERS THE QUESTION IN BEHALF OF THE DEFENDANT, I WOULD LIKE TO PROPOSE SEVERAL OBJECTIONS. FIRST I WOULD OBJECT TO THE QUALIFICATIONS OF THIS INDIVIDUAL TO DRAW SUCH AN OPINION WITHOUT EVER HAVING EXAMINED OR TALKED TO OR SEEN THIS DEFENDANT BEFORE THIS DATE. SECONDLY, I WOULD SUBMIT TO THE COURT THAT BY PRESUMING THIS HYPOTHETICAL EXAMPLE WHICH PURPORTS BY THE STATE TO BE A SUMMARY OF THEIR VERSION OF THE EVIDENCE THAT IT IS ASKING THIS WITNESS TO INVADE THE PROVINCE OF THIS JURY TO ASK THE QUESTIONS BY RENDING AN OPINION DIRECTLY ON THE QUESTION. THIRDLY, I WOULD OBJECT TO THE HYPOTHETICAL QUESTION ON THE GROUND THAT IT ASSUMES ONLY

AGGRAVATING TESTIMONY OF FACTS AND DOES NOT ASSUME ANY MITIGATING TESTIMONY OF FACTS. SECONDLY IT ASSUMES FACTS IN WHICH THERE IS CONFLICTING EVIDENCE. THIRD, IT ASSUMES THE CREDIBILITY OF THE WITNESSES AND THE TRUTH OF THE FACT THAT THE JURY MAY NOT NECESSARILY HAVE FOUND TO BE TRUE IN JUDGING THE DEFENDANT GUILTY. FOURTH, IT ASSUMES THE STATE OF MIND AS TO A PARTICULAR PERSON, FACTS THAT ARE NOT IN EVIDENCE AS TO STATE OF MIND. FIFTH, IT IN GENERAL IS AN INCOMPLETE SUMMARY OF THE EVIDENCE IN THIS CASE AND IT IS IMPOSSIBLE TO PRESENT A HYPOTHETICAL EXAMPLE TO THIS WITNESS WHICH WOULD TAKE INTO CONSIDERATION THE ENTIRE EVIDENCE OF THIS CASE SINCE IT IS NOT -- DOES NOT PRESENT TO THIS WITNESS A FULL VERSION OF WHAT THE FACTS, THEN THIS WITNESS HAS NO BASIS UPON WHICH TO MAKE AN ACCURATE ASSESSMENT OR DRAW AN ACCURATE OPINION AS TO WHAT THOSE FACTS ARE IN THIS CASE.

THE COURT: OVERRULED.

Q DOCTOR GRIGSON, THE QUESTION THAT I HAD IS DO YOU HAVE AN OPINION WITHIN REASONABLE PSYCHIATRIC CERTAINTY AS TO THE TYPE OF PERSONALITY OF THE INDIVIDUAL THAT WE WOULD BE DEALING WITH IN THAT HYPOTHETICAL SITUATION?

A YES, SIR. IF I CAN ASSUME THOSE FACTS ARE TRUE, THERE IS ENOUGH INFORMATION THERE TO GO AHEAD AND BASE AN OPINION WITH REGARD TO PERSONALITY MAKEUP.

Q AND WOULD YOU TELL THAT JURY WHAT YOUR OPINION WOULD

BE PLEASE, SIR?

A THIS WOULD BE A FAIRLY CLASSICAL, TYPICAL, SOCIOPATHIC PERSONALITY DISORDER.

Q WOULD YOU DESCRIBE FOR THE JURY, DOCTOR GRIGSON, WHAT IN YOUR MEDICAL AND IN YOUR PSYCHIATRIC OPINION ARE THE BASIC ELEMENTS AND MAKEUPS OF SOMEONE WHO HAS THAT PARTICULAR PERSONALITY DISORDER?

A YES, SIR. THE ANTISOCIAL PERSONALITY DISORDER IS A DESCRIPTIVE TERM TO DESCRIBE AN INDIVIDUAL THAT HAS CERTAIN PERSONALITY CHARACTERISTICS. THE MOST OUTSTANDING OF THESE IS THE LACK OF A CONSCIENCE. NO -- THEY DON'T HAVE A CONSCIENCE LIKE MOST OF US DEVELOP AT AN EARLY AGE. THEY REPEATEDLY BREAK THE RULES. THEY CON, MANIPULATE AND USE PEOPLE. THEY ARE ONLY INTERESTED IN THEIR OWN SELF PLEASURE, SELF GRATIFICATION. BUT PROBABLY AGAIN THE MOST OUTSTANDING FEATURE REALLY IS THE LACK OF A CONSCIENCE.

Q WOULD YOU STATE WHETHER OR NOT THERE ARE VARYING DEGREES OF SOMEONE WHO HAS A SOCIOPATHIC OR ANTISOCIAL PERSONALITY, DOCTOR GRIGSON?

A YES, SIR. THERE IS WHAT YOU WOULD CONSIDER AND SAY A MILD SOCIOPATH. THESE ARE INDIVIDUALS THAT ONLY BREAK RELATIVELY MINOR RULES -- AND YOU MIGHT PUT THEM ON A SCALE OF SAY, ONE TO TEN AND THEN YOU HAVE WHAT WOULD BE CALLED SAY, YOUR SEVERE SOCIOPATHS. THEY ARE

THE ONES THAT THEY HAVE COMPLETE DISREGARD FOR ANOTHER HUMAN BEINGS LIFE. YOU CAN SORT OF GO UP THE LADDER FROM ZERO TO TEN. THOSE PEOPLE THAT HAVE A DISREGARD FOR ANOTHER PERSON'S PROPERTY OR RIGHTS AND THEN YOUR MOST SEVERE SOCIOPATH ARE THOSE PEOPLE THAT THEY REALLY DO HAVE COMPLETE DISREGARD FOR ANOTHER HUMAN BEING'S LIFE

Q UNDER THE HYPOTHETICAL SITUATION THAT I HAVE JUST PRESENTED TO YOU, DOCTOR GRIGSON, WITH THOMAS ANDREW BAREFOOT, WHERE WOULD YOU PLACE THAT PARTICULAR PERSON AS FAR AS THE RANGE OF SEVERITY OF SOMEONE WHO HAS A SOCIOPATHIC OR ANTISOCIAL OR PSYCHOPATHIC PERSONALITY?

A BASED ON THOSE FACTS YOU GAVE ME?

Q YES, SIR.

A THAT WOULD FALL INTO YOUR MOST SEVERE CATEGORY. IF YOU GO UP ABOVE TEN, IT WOULD BE ABOVE TEN BUT REALLY IN YOUR MOST SEVERE SOCIOPATHS.

Q DOCTOR GRIGSON, WOULD YOU STATE FOR THE JURY PLEASE, SIR, WHETHER OR NOT IN YOUR KNOWN MEDICAL OPINION THAT THERE IS -- IS ANY KNOWN TREATMENT THAT CAN BE GIVEN TO A DEFENDANT THAT WOULD CHANGE HIS PARTICULAR PERSONALITY OR BEHAVIOR THAT HAS THOSE PARTICULAR PERSONALITY TRAITS?

A NO, THERE IS NOT ANYTHING IN MEDICINE OR PSYCHIATRY OR ANY OTHER FIELD THAT WILL ANY WAY AT ALL MODIFY OR CHANGE THE SEVERE SOCIOPATH. THERE IS JUST NOT ANYTHING AVAILABLE.

Q WOULD YOU STATE WHETHER OR NOT IN YOUR MEDICAL OPINIO THAT THAT PERSONALITY DISORDER WILL GET BETTER, REMAIN THE SAME OR GET WORSE?

A WELL, AFTER YOU'VE TAKEN ANOTHER HUMAN BEING'S LIFE WITHOUT ANY REASON OR CAUSE, YOU CAN'T GET ANY WORSE THAN THAT EXCEPT IN NUMBERS. THAT'S THE ONLY THING. BU IT REALLY CAN'T GET WORSE.

Q NOW, DOCTOR GRIGSON, ASSUMING IT IS TRUE, THE FACTS OF THE HYPOTHETICAL QUESTIONS THAT I HAVE JUST RECITED TO YOU, WOULD YOU STATE WHETHER OR NOT YOU HAVE AN OPINIO WITHIN REASONABLE PSYCHIATRIC CERTAINTY WHETHER OR NOT THERE IS A PROBABILITY THAT THE DEFENDANT, THOMAS ANDREW BAREFOOT, WILL CONTINUE TO COMMIT CRIMINAL ACTS OF VIOLENCE THAT WOULD CONSTITUTE A CONTINUING THREAT TO SOCIET

MR. BROWN: YOUR HONOR, AT THIS TIME BEFORE THE WITNESS ANSWERS THAT QUESTION, WE WOULD AGAIN OBJECT TO THE TESIMONY OF DOCTOR GRIZSON REGARDING HIS OPINION AS TO WHETHER THOMAS BAREFOOT PROBABLY WOULD COMMIT FUTURE ACTS OF VIOLENCE THAT WOULD CONSTITUTE A CONTINUING THREAT TO SOCIETY BECAUSE IT ALLOWS HIM TO DEFINE LEGAL TERMS AND ALLOWS HIM TO SET THE DEFINITION OF THE STATUTE ARTICLE THIRTY-SEVEN POINT O-SEVEN-ONE IN THE CODE OF CRIMINAL PROCEDURES. WE WILL FURTHER, IN ADDITION, OBJECT ON THE BASIS IT AGAIN EVADES THE PROVINCE OF THE JURY IN IT'S COUPLING OF HIS OPINION WITH THE HYPO-

THETICAL QUESTION PRESENTED BY THE STATE.

THE COURT: OVERRULED.

Q DOCTOR GRIGSON, IF I MAY RESTATE MY QUESTION FOR YOU PLEASE. ASSUMING AS TRUE THE FACTS OF THE HYPOTHETICAL QUESTION WHICH I HAVE JUST RECITED TO YOU, DO YOU HAVE AN OPINION WITHIN REASONABLE PSYCHIATRIC CERTAINTY WHETHER OR NOT THERE IS A PROBABILITY THAT THE DEFENDANT, THOMAS ANDREW BAREFOOT, WILL COMMIT CRIMINAL ACTS OF VIOLENCE THAT WOULD CONSTITUTE A CONTINUING THREAT TO SOCIETY?

A YES, SIR, I HAVE AN OPINION TO THAT.

Q WHAT WOULD THAT OPINION BE?

A YES, HE MOST CERTAINLY WOULD.

Q WOULD YOU STATE WHETHER OR NOT THAT WOULD BE TRUE REGARDLESS WHERE HE IS?

A IT WOULDN'T MATTER WHETHER HE WAS IN THE PENITENTIARY OR WHETHER HE WAS FREE. WHEREVER HE IS HE'S GOING TO CONTINUE WHAT HE'S ALREADY BEEN DOING.

Q WOULD YOU STATE WHETHER OR NOT, DOCTOR GRIGSON, YOU HAVE AN OPINION WITHIN REASONABLE PSYCHIATRIC CERTAINTY AS TO THE DEGREE OF THAT PROBABILITY THAT YOU HAVE JUST EXPRESSED TO THIS JURY?

A WELL, YES, SIR, I WOULD PUT IT AT ONE HUNDRED PERCENT AND ABSOLUTE.

MR. EADS: PASS THE WITNESS, YOUR HONOR.

CROSS EXAMINATION BY MR. BROWN

Q DOCTOR GRIGSON, IS IT TRUE THAT YOU HAVE NEVER PERSONALLY EXAMINED THIS DEFENDANT?

A NO, SIR, I HAVEN'T.

Q AND YOU HAVE NEVER MADE A CLINICAL EVALUATION OF THIS DEFENDANT?

A NO, SIR, I HAVEN'T.

Q AND YOU HAVE NEVER PERSONALLY SPOKEN TO THIS DEFENDANT?

A NO, SIR, I HAVEN'T.

Q AND YOU HAVE NEVER SEEN THIS DEFENDANT, IN FACT, BEFORE TODAY?

A NO, SIR, I HAVEN'T.

Q AND YOU HAVE NOT BEEN PRESENT DURING THE COURSE OF THIS TRIAL HAVE YOU, SIR?

A NO, SIR, I HAVEN'T.

Q AND YOU HAVE NOT HEARD THE WITNESSES, HEARD THEIR TESTIMONY OR JUDGED THE CREDIBILITY OF THE WITNESSES?

A NO, SIR, I HAVEN'T.

Q AND YOU DO NOT KNOW WHAT PORTIONS OF THE EVIDENCE THE JURY FOUND TO BE TRUE AND WHAT PORTIONS OF THE EVIDENCE THE JURY FOUND NOT TO BE TRUE?

A NO, SIR, I DON'T.

Q IF SOME OF THE ASSUMPTIONS OF THE STATE'S HYPOTHETICAL QUESTION WERE NOT TRUE, WOULD THAT EFFECT YOUR OPINION

ON THE STATE'S HYPOTHETICAL QUESTION?

A IT WOULD DEPEND UPON WHICH PARTS OF THE STATEMEN WOULD NOT BE TRUE AND HOW MANY OF THEM WOULD NOT BE TRUE IF THERE WERE ENOUGH OF THEM OR SPECIFIC ONES, YES, IT CERTAINLY WOULD.

Q ARE YOU A MEMBER OF THE AMERICAN PSYCHIATRIC ASSOCIATION?

A YES, SIR, I AM.

Q NOW, ARE YOU FAMILIAR WITH THE AMERICAN PSYCHIATRIC ASSOCIATION TASK FORCE REPORT ON CLINICAL ASPECTS OF THE VIOLENT INDIVIDUAL?

A NO, SIR, I'M NOT.

Q ARE YOU FAMILIAR WITH DOCTOR BERNARD DIAMOND'S ARTICLE ON THE PSYCHIATRIC PREDICTION OF DANGEROUSNESS?

A NO, SIR, I'M NOT.

Q ARE YOU FAMILIAR WITH COCOZZA AND STEADMAN'S ARTICLE ON THE FAILURE OF PSYCHIATRIC PREDICTIONS OF DANGEROUSNESS PUBLISHED IN NINETEEN SEVENTY-SIX?

A NO, SIR, I'M NOT.

Q ARE YOU FAMILIAR WITH DOCTOR GUTTMACHER'S CLINICAL EVALUATION OF THE DANGEROUSNESS OF THE MENTALLY ILL?

A NO, SIR, I'M NOT.

Q ARE YOU FAMILIAR WITH DOCTOR RUBIN'S ARTICLE ON THE PREDICTION OF DANGEROUSNESS IN MENTALLY ILL CRIMINALS?

A NO, SIR.

Q ARE YOU AWARE, DOCTOR, THAT IT IS THE POSITION OF THE AMERICAN PSYCHIATRIC ASSOCIATION THAT PSYCHIATRISTS CANNOT RELIABLY PREDICT WHETHER OR NOT SOMEONE -- CRIMINALS IN THE FUTURE ARE GOING TO COMMIT FUTURE ACTS OF VIOLENCE?

A NO, THAT'S NOT TRUE. THIS IS THAT SAME GROUP THAT FOUND HOMOSEXUALITY WAS NOT AN ILLNESS AND THIS IS SMALL MINORITY GROUP.

Q I HAVEN'T IDENTIFIED THE GROUP, SIR.

A THIS IS ONLY A VERY SMALL MINORITY GROUP. IT'S NOT THE AMERICAN PSYCHIATRIC ASSOCIATION THAT BELIEVES THAT.

Q I HAVE NOT IDENTIFIED THE GROUP, SIR.

A I'M SORRY.

Q HOW LONG HAVE YOU SAID THAT YOU'VE BEEN WORKING IN THIS AREA, SIR?

A I'VE BEEN DOING CRIMINAL EVALUATIONS FOR A LITTLE OVER FIFTEEN YEARS.

Q AND DO YOU BELIEVE THAT THE AMERICAN PSYCHIATRIC ASSOCIATION HAS A RESPONSIBILITY TO CONDUCT, PERHAPS RESEARCH AND EVALUATIONS IN DIFFERENT AREAS OF THE PROFESSION THAT ARE PERHAPS GREY AREAS?

A NOW I'M NOT SURE I UNDERSTAND WHAT YOUR QUESTION WAS. COME AGAIN.

Q DON'T YOU THINK THAT YOUR PROFESSION HAS A CONTINUI
OBLIGATION TO EXAM THE BASIS AND THE AREAS IN WHICH IT
IS PRACTICING?

A OH, ABSOLUTELY, YES, SIR.

Q AND DO YOU TRY TO MAKE YOURSELF FAMILIAR WITH THOSE
AREAS, SIR?

A I'M DOING IT MOSTLY MYSELF.

Q DO YOU TRY TO READ BOTH THE ARTICLES THAT ARE PRO
AND CON FOR THE POSITIONS THAT YOU, YOURSELF, MAY HAVE?

A WELL, I REALLY TRY TO READ ABOUT FORTY JOURNALS
A MONTH. NOW SOME OF THOSE ARE ACTUALLY JOURNALS OF
MEDICINE. THE MAJORITY OF THEM ARE IN PSYCHIATRY. AND
I REALLY TRY TO KEEP UP WITH WHAT IS GOING ON IN THE
FIELD OF PSYCHIATRY. SOME OF THOSE ARTICLES I DISAGREE
WITH. SOME OF THEM I AGREE WITH.

Q DO YOU READ THE JOURNAL OF VIOLENCE OF CRIMINAL
JUSTICE?

A. NO, SIR, I DON'T.

Q DO YOU READ THE BULLETIN OF THE AMERICAN ACADEMY FOR
PSYCHOLOGY AND LAW?

A NO, SIR, I HAVEN'T HEARD OF IT.

Q DO YOU READ THE JOURNAL OF CRIME AND DELINQUENCY?

A NO, SIR, I DON'T.

Q DO YOU READ THE JOURNAL OF CRIMINAL JUSTICE AND
BEHAVIOR?

A NO, SIR, I'M NOT AWARE OF IT.

Q DO YOU READ THE AMERICAN BEHAVIORAL SCIENTIST?

A NO, SIR, I DON'T.

Q ARE YOU THE SAME DOCTOR GRIGSON THAT WAS WRITTEN UP IN THE TEXAS MONTHLY RECENTLY, SIR?

A YES, SIR, I AM.

MR. BROWN: PASS THE WITNESS, YOUR HONOR.

REDIRECT EXAMINATION BY MR. EADS

Q DOCTOR GRIGSON, REGARDING THAT ARTICLE IN THE TEXAS MONTHLY, WHAT WAS THAT ARTICLE REFERRING TO?

A IT WAS AN ARTICLE SUPPOSEDLY ON THE DEATH PENALTY. I WAS INTERVIEWED AND SOME STATEMENTS WERE MADE THAT REALLY WERE INCORRECT. BUT IT PRIMARILY HAD TO DO WITH THE DEATH PENALTY.

Q ALRIGHT, SIR. IN THIS ARTICLE IN THE TEXAS MONTHLY REGARDING THE DEATH PENALTY, WASN'T THIS DEFENSE ATTORNEY OVER HERE, GERALD BROWN, ALSO IN THAT SAME TEXAS MONTHLY ARTICLE ABOUT THE DEATH PENALTY?

A YES, SIR, I BELIEVE HE WAS.

MR. EADS: PASS THE WITNESS.

MR. BROWN: NO FURTHER QUESTIONS.

THE COURT: YOU MAY STEP DOWN. MAY THIS WITNESS BE EXCUSED?

MR. EADS: YES, YOUR HONOR.

MR. BROWN: NO OBJECTION, YOUR HONOR.

THE COURT: YOU ARE EXCUSED. THANK YOU, DOCTOR GRIGSON.

MR. EADS: THE STATE OF TEXAS RESTS, YOUR HONOR.

MR. BLYTHE: MAY WE HAVE A RECESS, YOUR HONOR?

AT THIS POINT THERE WAS A DISCUSSION BETWEEN THE COURT AND COUNSEL FOR BOTH SIDES

THE COURT: LADIES AND GENTLEMEN OF THE JURY, WE'RE GOING TO RECESS UNTIL IN THE MORNING AT NINE O'CLOCK. I WANT TO REMIND YOU OF THE INSTRUCTIONS THAT I HAVE GIVEN TO YOU EACH EVENING AS WE RECESS AND I WANT TO RESPECTIVELY URGE YOU ONCE AGAIN NOT TO DISCUSS THIS CASE AMONG YOURSELVES OR WITH ANYONE ELSE AND NOT TO PERMIT ANYONE TO DISCUSS IT IN YOUR PRESENCE. NOT TO VIEW ANY ACCOUNTS ON TELEVISION OR LISTEN TO ANY ACCOUNTS ON THE RADIO OR ON T.V. OR READ ANY ACCOUNTS IN THE PAPER OR ANY OTHER PERIODICAL. WE WILL BE BACK IN THE MORNING AT NINE O'CLOCK. I'LL ASK THE JURY TO BE HERE AT NINE O'CLOCK. I BELIEVE WE WILL BE READY TO CHARGE THE JURY AND ARGUE THE CASE AND IT WILL BE IN YOUR HANDS SHORTLY THEREAFTER. THE JURY THEN -- THE JURY IS NOW EXCUSED. EVERYONE ELSE REMAIN SEATED WHILE THE JURY GOES OUT. WE ARE IN RECESS. THANK YOU LADIES AND GENTLEMEN.

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SUPREME COURT, U.S.

CAUSE NUMBER 82-1680

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

****

THOMAS A. BAREFOOT,
Petitioner

VERSUS

W. J. ESTELLE, JR., DIRECTOR
TEXAS DEPARTMENT OF CORRECTIONS,
Respondent

****

EXHIBITS ON

MOTION FOR STAY OF EXECUTION

****

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Petitioner's lawyers

AND THEN ONE OF THE DEFENSE ATTORNEYS WILL RESPOND AND POSSIBLY BOTH AND THEN MR. EADS WILL CLOSE FOR THE STATE. SO IF YOU WOULD PLEASE, IF YOU'LL GIVE THEM YOUR ATTENTION. MR. LEITNER.

MR. LEITNER: MAY IT PLEASE THE COURT?

THE COURT: YES.

MR. LEITNER: LADIES AND GENTLEMEN, ONCE AGAIN THE FAMILY AND FRIENDS OF CARL LEVIN AND ALL THE INTERESTED CITIZENS OF BELL COUNTY, TEXAS. THIS, LADIES AND GENTLEMEN, IS THE MOST IMPORTANT PHASE OF THIS TRIAL BECAUSE THIS IS THE ONLY TIME THAT THOMAS ANDREW BAREFOOT IS HELD ACCOUNTABLE FOR HIS ACTIONS. THIS IS THE ONLY TIME THAT HE HAS FINALLY REACHED THE ACCOUNTABILITY STAGE. I WILL BEGIN THE SAME WAY I BEGAN MY FINAL ARGUMENT ON GUILT OR INNOCENCE AND THAT IS TO TELL YOU THIS. YOU'VE ALREADY HEARD ALL THE EVIDENCE. ALL THE EVIDENCE IS BEFORE YOU RIGHT NOW. I WILL PREFACE EVERYTHING THAT I SAY WITH THIS AND EVERYTHING THAT MR. EADS SAYS. WHAT WE'RE TELLING YOU NOW IS OUR REASONABLE DEDUCTION FROM THE EVIDENCE BUT WE WANT YOU TO FOLLOW THE LAW AND WE WANT YOU TO BASE YOUR VERDICT ON WHAT YOU HEARD FROM THAT WITNESS STAND BECAUSE THAT'S WHAT THE LAW SAYS. WHAT WE SAY AND WHAT THEY SAY IS NOT EVIDENCE IN THIS TRIAL. BUT YOU HAVE THE FACTS IN FRONT OF YOU. I FEEL AT THIS POINT THAT YOU PROBABLY HAVE ALL THE SUFFICIENT

FACTS IN FRONT OF YOU TO SHOW YOU BEYOND A REASONABLE DOUBT THAT THE ANSWER TO THESE TWO QUESTIONS SHOULD BE YES. I FEEL THAT I WOULD NOT BE DOING MY DUTY TO THE CITIZENS OF THIS COUNTY AND TO CARL LEVIN IF I DIDN'T STAND UP HERE AND SAY SOMETHING THOUGH AND I'M GOING TO PROCEED ON THAT. LOOKING AT THE CHARGE THERE IS REALLY NO NEED FOR ME TO GO OVER THE CHARGE LIKE I DID ON THE FIRST PHASE OF THE TRIAL BECAUSE THIS PHASE IS BASICALLY THE SAME THING AS FAR AS THE CHARGE GOES. OUR BURDEN IS STILL THE SAME TO PROVE BEYOND A REASONABLE DOUBT. AS A PART OF THE CHARGE IT ALSO SAYS THAT THE SAME DIRECTIONS TO YOU IN LOOKING AT AN EXPERT'S TESTIMONY THAT YOU HAD IN THE FIRST PHASE OF THE TRIAL. WHEN YOU GET TO THE TWO FINAL QUESTIONS IT SAYS THAT IF ALL TWELVE OF YOU UNANIMOUSLY AGREE THAT THE ANSWER SHOULD BE YES, YOU WOULD WRITE YES IN THE BLANK AND THEN THE FOREMAN WOULD SIGN IT. IF TEN OR MORE THINK THAT IT SHOULD BE NO, YOU WOULD THEN WRITE NO AND THE TEN OR MORE WOULD SIGN THE VERDICT SHEET. I'LL SUBMIT TO YOU LADIES AND GENTLEMEN THAT A REASONABLE DEDUCTION FROM THE EVIDENCE IS THAT THE ONLY TWO TRUTHFUL AND POSSIBLE ANSWERS IN THIS CASE WOULD BE YES TO BOTH QUESTIONS.

LOOKING FIRST AT QUESTION NUMBER ONE IT SAYS, WAS THE CONDUCT OF THIS DEFENDANT COMMITTED DELIBERATELY? AND WAS IT WITH THE REASONABLE EXPECTATION THAT THE DEATH

OF CARL LEVIN WOULD RESULT? NOW YOU'VE ALREADY FOUND THAT THE CONDUCT WAS INTENTIONAL OR KNOWING. AND I'LL SUBMIT TO YOU LADIES AND GENTLEMEN THAT NO REASONABLE PERSON COULD CONSIDER THAT THE CONDUCT OF THIS DEFENDANT WHEN HE PULLS THAT GUN OUT OF HIS POCKET AND PLACES IT TO THE LEFT TEMPLE OF CARL LEVIN WAS ANYTHING ELSE THAN A DELIBERATE ACT. I'LL SUBMIT TO YOU THAT YOU FOUND THAT OUT WHEN YOU FOUND HIM GUILTY OF INTENTIONALLY AND KNOWINGLY MURDERING CARL LEVIN. THE SECOND PART OF THAT QUESTION, WAS THERE A REASONABLE EXPECTATION THAT THE DEATH OF THE DECEASED OR ANOTHER WOULD RESULT -- THE DEATH OF THE DECEASED IN THIS CASE, CARL LEVIN? LOOK AT WHERE THE BULLET HOLE WAS STRATEGICALLY PLACED. I'LL ASK YOU TO USE YOUR OWN COMMON KNOWLEDGE. IF YOU WANT TO INJURE SOMEBODY YOU CAN SHOOT THEM IN THE LEG AND THE STOMACH AND THE CHEST AND THE ARMS, WHEREVER YOU WANT TO. IF YOU'VE GOT THE DROP ON SOMEBODY LIKE HE HAD ON CARL LEVIN, YOU DON'T EVEN HAVE TO SHOOT THEM. YOU CAN DISARM CARL LEVIN, KNOCK HIM OVER THE HEAD OR WHATEVER YOU WANT TO DO. BUT HE KILLED CARL LEVIN BECAUSE HE WANTED TO KILL CARL LEVIN. ANY HUNTER OR ANY HUMAN BEING KNOWS THAT THE MOST -- THE PLACE ON THE HUMAN BODY THAT IS GOING TO CAUSE INSTANTANEOUS DEATH IS A SHOT TO THE BRAIN. YOU TAKE A SMALL CALIBER WEAPON LIKE A TWENTY-FIVE CALIBER AUTOMATIC AND YOU WANT TO PUT SOMEBODY OUT OF COMMIS-

SION INSTANTANEOUSLY, THE PLACE FOR THAT BULLET TO GO IS THE BRAIN. AT A DISTANCE OF THREE INCHES NO REASONABLE PERSON COULD ASSUME THAT IT WAS AN ACCIDENT THAT HE PLACED IT IN CARL LEVIN'S BRAIN. THOMAS ANDREW BAREFOOT PLACED IT THERE BECAUSE THAT'S WHAT HE WANTED TO DO. HE DELIBERATELY KILLED CARL LEVIN AND I'LL SUBMIT TO YOU THAT THERE IS NO NEED FOR ME EVEN TO TALK ABOUT SPECIAL ISSUE NUMBER ONE ANYMORE BECAUSE I COULD NOT SEE HOW ANY REASONABLE PERSON COULD ASSUME THAT A THREE INCH SHOT TO THE BRAIN THAT YOU WOULDN'T EXPECT DEATH TO RESULT. WELL, INSTANTANEOUS DEATH RESULTED AND IT RESULTED BECAUSE THOMAS ANDREW BAREFOOT WANTED IT TO. HE DIDN'T WANT TO MAIM CARL LEVIN. HE DIDN'T JUST WANT TO GET THE DROP ON HIM. HE DIDN'T WANT TO WOUND HIM. HE WANTED TO KILL HIM. AND KILL HIM HE DID.

THEN I'LL GO TO SPECIAL ISSUE NUMBER TWO. I FEEL THAT THERE IS NOT ENOUGH THAT I COULD SAY FOR CARL LEVIN AT THIS POINT IN TIME BUT I FEEL THAT ALL THE EVIDENCE HAS SHOWED YOU THE ANSWER TO SPECIAL ISSUE NUMBER ONE IS BEYOND ANY DOUBT YES.

LOOKING AT SPECIAL ISSUE NUMBER TWO YOU HAVE TO DECIDE IF THERE IS A PROBABILITY THAT THOMAS ANDREW BAREFOOT WILL CONTINUE TO COMMIT CRIMINAL ACTS OF VIOLENCE IN THE FUTURE THAT WILL MAKE HIM A CONTINUING THREAT TO SOCIETY. WE TOLD YOU THAT WE DON'T HAVE TO BRING YOU ANY

MORE EVIDENCE ON THE SECOND PHASE OF THE TRIAL BUT WE TOLD YOU THAT WE WOULD. I BELIEVE THE EVIDENCE THAT WE SHOWED YOU ON GUILT OR INNOCENCE IS SUFFICIENT TO SHOW YOU THAT THE ANSWER SHOULD BE YES. BUT LET'S LOOK AT WHAT ELSE THE STATE HAS ALSO BROUGHT TO YOU.

THERE ARE MANY PEOPLE THAT GO THROUGH LIFE NEVER MAKING A MARK ON SOCIETY. THEY COME, THEY LIVE THEIR LIFE AND THEY LIVE A GOOD LIFE. THEIR IMMEDIATE FAMILY KNOWS THEM AND LOVES THEM AND RESPECTS THEM AND APPRECIATES THEM BUT THE REST OF THE WORLD DOESN'T KNOW ABOUT THEM OR EVEN HEAR ABOUT THEM. THIS IS NOT THE SAME WITH THOMAS ANDREW BAREFOOT. ALL TWELVE OF YOU TOLD US UNDER OATH ON VOIR DIRE THAT YOU DIDN'T KNOW THOMAS ANDREW BAREFOOT. BUT I'LL SUBMIT TO YOU THAT YOU ALL KNOW HIM NOW. THOMAS ANDREW BAREFOOT, WE BROUGHT YOU EVIDENCE ABOUT HIM FOR THE LAST NINE YEARS. AS HE MOVED ACROSS ONE-TENTH OF THE CONTINENTAL UNITED STATES LEAVING HIS MARK EVERYWHERE THAT HE WENT. MORGAN CITY, LOUISIANA, NEW IBERIA, LOUISIANA. LAFAYETTE, LOUISIANA, AS HE'S MOVING THROUGH THE STATE OF LOUISIANA HE LEAVES HIS MARK BEHIND HIM AND WHAT IS THAT MARK? THAT MARK IS THAT HE'S NOT PEACEFUL AND HE'S NOT LAW ABIDING. WITH DANNY HAWKES I SPECIFICALLY BROUGHT IT OUT WHEN WE WERE TALKING ABOUT LAW ABIDING WE WERE TALKING ABOUT THE CRIMINAL LAW, NOT PATENT LAW, NOT CORPORATE LAW, BUT CRIMINAL LAWS.

IF YOU'RE NOT LAW ABIDING IN THE CRIMINAL SENSE, WHAT DOES THAT MEAN? IF YOU'RE NOT PEACEFUL IN THE CRIMINAL LAW ABIDING SENSE, WHAT DOES THAT MEAN? IS IT NOT A REASONABLE DEDUCTION FROM THE EVIDENCE THAT THAT MEANS THAT WE'RE TALKING ABOUT A REPUTATION FOR BEING VIOLENT IN A CRIMINAL SENSE? IT DIDN'T STOP IN NINETEEN SIXTY-NINE. IT CARRIES WITH IT ALL THE WAY TO AUGUST OF NINETEEN SEVENTY-EIGHT. LET'S WALK IT THROUGH. MORGAN CITY, NEW IBERIA, LAFAYETTE, LOUISIANA. GAINING A REPUTATION AND AT THAT TIME GAINING FOUR CONVICTIONS. TWO OF THOSE BEING FELONY CONVICTIONS. DID HE LEARN ANY THING? HE PROCEEDS ON FROM THAT POINT TO WOODWARD, OKLAHOMA. TO OKLAHOMA CITY. PICKS UP ANOTHER FELONY CONVICTION. DID HE LEARN ANYTHING? HE GAINS THAT REPUTATION AND GOES ON DOWN TO ODESSA, ECTOR COUNTY, TEXAS. HAS HE LEARNED ANYTHING? HE ESTABLISHED FOR HIMSELF THE SAME REPUTATION. HE THEN GOES BACK TO WOODWARD COUNTY, OKLAHOMA, TO NEODESHA, KANSAS, STILL AS HE'S LEAVING THOSE PLACES HE'S LEAVING HIS MARK. LEAVING HIS MARK ON THOSE COMMUNITIES TO KNOW WHAT THOMAS ANDREW BAREFOOT IS REALLY LIKE. HE THEN PROCEEDS ON TO VALENCIA COUNTY, NEW MEXICO. I'LL SUBMIT TO YOU HE ALSO ONCE AGAIN LEFT HIS MARK THERE. LOS LUNAS, GRANTS, NEW MEXICO, THE ENTIRE COMMUNITY OF VALENCIA COUNTY, NEW MEXICO, NOW KNOWS THOMAS ANDREW BAREFOOT AS YOU KNOW THOMAS ANDREW

BAREFOOT. FROM THAT POINT FORWARD HE PROCEEDS ON TO CENTRAL TEXAS. AND HE LEFT HIS MARK IN CENTRAL TEXAS. HE LEFT HIS MARK ON THE LEFT TEMPLE OF CARL LEVIN BECAUSE HE'S EXHIBITING THE CONDUCT THAT HE HAS EXHIBITED FOR THE LAST NINE YEARS. WHEN THEY STAND UP AND THEY SAY WHERE IS THE VIOLENCE, I'LL ASK THAT YOU DO THIS FOR CARL LEVIN. IF THAT IS EVER SAID DURING THE FINAL ARGUMENT OF THESE DEFENSE ATTORNEYS TO LOOK AT THIS CLOSELY. LOOK AT CARL LEVIN AS HE LAYS THERE DYING IN THE GUTTER OF HARKER HEIGHTS, TEXAS. THAT IS THE VIOLENCE WE'RE TALKING ABOUT. THAT IS THE ACCUMULATION OF THE ENTIRE LIFE OF CRIME. AND THE ENTIRE LIFE OF VIOLENCE. THE LIFE OF THOMAS ANDREW BAREFOOT. AND IF THAT'S NOT ENOUGH, LADIES AND GENTLEMEN, I'D ASK YOU TO LOOK AT THIS. LOOK AT WHAT YOU FOUND OUT FROM THE WITNESSES THAT THOMAS ANDREW BAREFOOT SAID ABOUT HIS OWN LIFE. ABOUT THE PREDICTIONS THAT HE MADE. LET'S LOOK AT HOW WELL HIS PREDICTIONS CAME TRUE. HE PREDICTED THAT HE WOULD KILL A COP. THERE IS A COP AND HE'S DEAD. HE PREDICTED THAT HE WOULD COMMIT ARSON, THAT HE WOULD EITHER BLOW UP OR BURN UP A BUILDING. THAT PREDICTION CAME TRUE. HE PREDICTED THAT HIS FRIENDS WOULD BE READING ABOUT HIM IN THE NEWSPAPER. THAT PREDICTION CAME TRUE. HE PREDICTED THAT IF SEEN HE WOULD CHANGE HIS IDENTITY SO THE WITNESSES WOULD HAVE A TOUGHER TIME IDENTIFYING HIM. THAT PREDIC-

TION CAME TRUE. HE WENT FURTHER AND HE PREDICTED THAT IF NECESSARY HE WOULD KILL THOSE WITNESSES. WELL, I'LL SUBMIT TO YOU, LADIES AND GENTLEMEN, IT WASN'T NECESSARY. IT WASN'T NECESSARY AT ALL BUT THE LAST PART OF THAT PREDICTION CAME TRUE. HE KILLED A WITNESS. HE KILLED CARL LEVIN ON THE STREETS OF HARKER HEIGHTS ON AUGUST THE SEVENTH OF NINETEEN SEVENTY-EIGHT. AND HOW WHEN YOU'RE LOOKING AT HIS FUTURE CONDUCT I WANT YOU TO LOOK AT HIS LAST PREDICTION. WHAT HE TOLD ROBERT ROBERSON IN THAT TRAILER BEFORE HE LEFT TO KILL CARL LEVIN AND TO COMMIT THE ARSON. HE TOLD HIM I'VE GOT TO DO THIS SO EVERYBODY KNOWS I MEAN WHAT I SAY AND THAT I CAN THEN GO ON TO THE NEXT THING. WELL, WE KNOW NOW HE MEANS WHAT HE SAYS. WE KNOW HE MEANS IT WHEN HE SAYS HE'S GOING TO KILL A COP. WE KNOW HE MEANS IT WHEN HE SAYS HE'S GOING TO KILL THE WITNESSES. WE KNOW HE MEANS IT WHEN HE SAYS HE'S GOING TO CHANGE HIS IDENTITY. WE KNOW HE MEANS IT WHEN HE SAYS HE'S GOING TO COMMIT AN ARSON. WE KNOW HE MEANS IT WHEN HE SAYS HIS FRIENDS ARE GOING TO READ ABOUT HIM IN THE NEWSPAPER. AND NOW WE'RE LEFT WITH THAT FINAL PREDICTION THAT HE CAN GO ON TO THE NEXT THING. AND LADIES AND GENTLEMEN, IF YOU DON'T THINK THAT INVOLVES CRIMINAL VIOLENCE, WHAT COULD IT POSSIBLY INVOLVE? AND THERE IS ONLY ONE THING STANDING BETWEEN HIM AND THAT LAST PREDICTION AND THAT'S YOU, THE JURY.

YOU NOW HAVE THE CHANCE TO HOLD HIM ACCOUNTABLE FOR HIS CONDUCT. LET'S LOOK AT HIS CONDUCT ONE STEP FURTHER. DID HE LEARN ANYTHING AT ALL OVER THE LAST NINE YEARS? THE POSSIBILITY OF THREE LIFE SENTENCES IN NEW MEXICO DID NOT DETER HIS CONDUCT. HE RUNS AWAY FROM THAT NOT TO BE HELD ACCOUNTABLE. HE SHOWS UP IN CENTRAL TEXAS. WE FOUND OUT FROM THE DEFENSE ATTORNEY THAT SELLING METHAMPHETAMINE CARRIES WITH IT A POSSIBLE LIFE SENTENCE. DID THAT DETER HIS CONDUCT? IT WAS A DAY BY DAY EVERY-DAY LIFE OF THOMAS ANDREW BAREFOOT. WE'RE TALKING ABOUT LIFE SENTENCES AND NOW THEY'RE GOING TO STAND UP HERE AND ASK YOU TO GIVE HIM A LIFE SENTENCE. AND IF YOU GIVE HIM A LIFE SENTENCE THAT'S JUST EXACTLY WHAT YOU'LL BE DOING AND THAT IS GIVING HIM A LIFE SENTENCE. NOT BECAUSE THAT'S WHAT HE DESERVES AND NOT BECAUSE HE'S NOT GOING TO COMMIT CRIMINAL ACTS OF VIOLENCE AGAIN IN THE FUTURE. ALL THOSE POSSIBILITES OF LIFE SENTENCES DIDN'T DETER HIM ONE BIT. IF YOU BELIEVE THAT THE MOTIVE OF CARL -- THOMAS ANDREW BAREFOOT WHEN HE KILLED CARL LEVIN WAS AT THAT TIME TO MAKE SURE THAT HE WOULD NOT BE ARRESTED, IDENTIFIED AND HAVE TO BE ACCOUNTABLE FOR HIS CONDUCT, IF YOU BELIEVE THAT ON THE FIRST PHASE OF THIS TRIAL, ALL I CAN TELL YOU LADIES AND GENTLEMEN IS, THAT'S STILL THERE. THOSE CHARGES ARE STILL PENDING. THAT REASON OR THAT MOTIVE HASN'T CHANGED. ALL YOU'RE

ADDING TO IT NOW IS ONE MORE PROBABILITY OF A LIFE SENTENCE. IF HE'S THE TYPE OF PERSON THAT WILL KILL TO AVOID BEING HELD ACCOUNTABLE FOR HIS CONDUCT, THAT HASN'T CHANGED. THAT HASN'T CHANGED ONE BIT.

NOW, LADIES AND GENTLEMEN, I THINK ANY REASONABLE PERSON COULD ASSUME YOU FOUND BY YOUR VERDICT ON GUILT OR INNOCENCE THAT ON AUGUST THE SEVENTH OF NINETEEN SEVENTY-EIGHT, THAT DEFENDANT WAS A THREAT TO SOCIETY. AND NOT THAT HE PROBABLY WOULD COMMIT CRIMINAL ACTS OF VIOLENCE BUT THAT HE DID COMMIT THE ULTIMATE ACT OF CRIMINAL VIOLENCE WHEN HE SO SENSELESSLY AND USELESSLY WASTED THE LIFE OF CARL LEVIN. AND IF THAT'S HOW YOU FELT WHEN YOU REACHED THAT VERDICT I CAN SUBMIT TO YOU THIS. HOW HAS THIS DEFENDANT CHANGED? TO SAY NOW TODAY AS HE SITS THERE, HE'S CHANGED, THEN YOU WOULD HAVE TO CONSIDER THAT THE KILLING OF CARL LEVIN WAS SOMEHOW A MITIGATING CIRCUMSTANCE THAT MADE HIM LESS VIOLENT. THAT LEADING THAT LIFE THAT CULMINATES IN THE FINAL ULTIMATE CRIMINAL ACT HAS MADE HIM LESS VIOLENT. LADIES AND GENTLEMEN, THAT'S NOT REASONABLE. ALL WE ASKED FROM THE START IS THAT WE HAVE A REASONABLE APPLICATION OF THE CRIMINAL LAWS OF THIS STATE. I KNOW OF NOTHING ELSE THAT I CAN SAY UP HERE IN DEFENSE OF CARL LEVIN BECAUSE THAT'S WHAT IT AMOUNTS TO. CARL LEVIN AS YOU CAN SEE WAS A LIVE HUMAN BEING ON THE MORNING OF AUGUST THE

SEVENTH OF NINETEEN SEVENTY-EIGHT. BECAUSE OF THE FACT THAT THIS DEFENDANT HAS THE PROBABILITY OF COMMITING CRIMINAL ACTS OF VIOLENCE THAT MAKES HIM A CONTINUING THREAT TO SOCIETY, CARL LEVIN LOST HIS LIFE. SENSELESSLY, USELESSLY FOR SEVEN HUNDRED AND TWENTY-SIX DOLLARS A MONTH. JUST SO HE COULD PROTECT THE CITIZENS OF HARKER HEIGHTS, TEXAS. HIS LIFE WENT FROM THIS STAGE TO NOTHING BUT A SPOT OF BLOOD ON THE CITY STREET OF HARKER HEIGHTS, TEXAS AND A CHALK OUTLINE AND A BADGE IN A MATTER OF MINUTES BECAUSE THOMAS ANDREW BAREFOOT DOES NOT WANT TO BE HELD ACCOUNTABLE FOR HIS CONDUCT. ALL I CAN ASK YOU, LADIES AND GENTLEMEN, IS THIS. NOW THE BUCK STOPS RIGHT HERE. NOW HE CAN BE HELD ACCOUNTABLE FOR HIS CONDUCT. I WANT NEVER AGAIN IN HISTORY FOR ANOTHER PERSON TO HAVE TO SACRIFICE THEIR LIFE JUST SO THOMAS ANDREW BAREFOOT CAN BE BROUGHT BEFORE ANOTHER JURY. THIS IS THE SIXTH TIME HE HAS COME INTO COURT TO FACE ACCOUNTABILITY. LADIES AND GENTLEMEN, IT HAS TO STOP HERE. I WILL SUBMIT TO YOU THAT THE EVIDENCE SHOWS BEYOND ANY REASONABLE DOUBT THE ANSWERS TO THESE TWO QUESTIONS SHOULD BE YES. THAT YOU CAN LIFE UP TO YOUR OATH AS PROTECTORS OF ALL SOCIETY AND FOR WHAT YOU CAME HERE FOR ONLY BY FINDING THE VERDICT OF YES YOUR ANSWER TO BOTH OF THESE QUESTIONS. NOT BECAUSE THAT'S WHAT I WANT AND BECAUSE THAT'S WHAT THESE PEOPLE WANT BUT BECAUSE THAT'S WHAT THE FACTS SHOW

AND THAT'S WHAT THE TRUTH IS. THANK YOU LADIES AND GENTLEMEN.

THE COURT: THANK YOU, MR. LEITNER.

MR. BROWN: MAY IT PLEASE THE COURT?

THE COURT: YES, SIR.

MR. BROWN: LADIES AND GENTLEMEN OF THIS JURY, I AM NOT GOING TO TALK ABOUT ALL OF THE EVIDENCE THAT HAS BEEN BROUGHT BEFORE YOU IN THIS CASE. MR. BLYTHE IS GOING TO FOLLOW ME AND HE WILL TALK ABOUT SOME OF IT. WHAT I PARTICULARLY WOULD LIKE TO EMPHASIZE THOUGH IS THE PSYCHIATRIC TESTIMONY THAT YOU HEARD AND HOW THAT RELATES TO THE OTHER EVIDENCE. I DON'T THINK I NEED TO TELL YOU THAT THE STATE IS RELYING HEAVILY UPON THE TESTIMONY OF DOCTOR JOHN HOLBROOK AND DOCTOR JAMES GRIZSON.

THE COURT: LET'S STOP TALKING BACK THERE. THIS IS A COURT OF LAW AND I DEMAND THAT THIS TALKING IN THE AUDIENCE STOP. NOW IF YOU WANT TO TALK GET UP AND LEAVE.

MR. BROWN: MAY I PROCEED, YOUR HONOR?

THE COURT: YES, SIR.

MR. BROWN: IF YOU CHOOSE TO ACCEPT THE TESTIMONY OF THESE TWO DOCTORS, THEN THERE WOULD BE NO NECESSITY FOR YOU TO LOOK AT THE EVIDENCE BECAUSE THEY HAVE SUGGESTED THE ANSWERS TO YOU TO THE PUNISHMENT

QUESTIONS. I BELIEVE THAT THERE ARE A NUMBER OF REASONS NOT TO ACCEPT THEIR TESTIMONY AND THAT'S WHAT I WANT TO TALK TO YOU ABOUT RIGHT NOW. FIRST OF ALL WE NEED TO ASK WHETHER OR NOT THEY CAN PREDICT HUMAN BEHAVIOR TO THE CERTAINTY THAT THEY SAY THEY CAN. ON CROSS EXAMINATION IT WAS STATED BY DOCTOR HOLBROOK THAT THERE IS A SUBSTANTIAL BODY OF PSYCHIATRIC LITERATURE AND STUDIES WHICH SAY THAT THEY CANNOT PREDICT HUMAN BEHAVIOR TO THE RELIABILITY THAT THEY SAY. DOCTOR HOLBROOK ADMITTED THE EXISTENCE OF SUCH LITERATURE TO THE STATE. DOCTOR GRIZSON CONVENIENTLY SAID THAT HE HADN'T READ ANY OF THIS MATERIAL OR LITERATURE. BOTH OF THEM ACKNOWLEDGED BEING MEMBERS OF THE AMERICAN PSYCHIATRIC ASSOCIATION. DOCTOR HOLBROOK ADMITTED THAT THE AMERICAN PSYCHIATRIC ASSOCIATION HAD APPOINTED A TASK FORCE TO STUDY THE CLINICAL ASPECTS OF THE VIOLENT INDIVIDUAL. HE FURTHER ADMITTED THAT THE CONCLUSIONS OF THAT TASK FORCE WERE AS FOLLOWS. FIRST, THAT NEITHER PSYCHIATRISTS NOR ANYONE ELSE HAVE RELIABLY DEMONSTRATED AN ABILITY TO PREDICT FUTURE VIOLENCE OR DANGEROUSNESS. SECONDLY, THAT PSYCHIATRIC EXPERTISE IN THE PREDICTION OF DANGEROUSNESS IS NOT ESTABLISHED AND THE CLINICIANS SHOULD AVOID CONCLUSORY (PHONETIC) JUDGMENTS IN THAT REGARD. NOW OBVIOUSLY, DOCTOR GRIGGS AND DOCTOR HOLBROOK DO NOT AGREE WITH THE AMERICAN PSYCHIATRIC ASSOCIATION IN THAT REGARD AND I

WONDERED LAST NIGHT AS I WAS CONSIDERING THEIR TESTIMONY IF WE ARE NOT ON THE THRESHOLD OF A WHOLE NEW MEDICAL BREAKTHROUGH. PSYCHIATRY BY MAIL. YOU SEND SOME FACTS IN TO THE DOCTOR AND WITHOUT A CLINICAL ANALYSIS, WITHOUT EVER HAVING SEEN THE PATIENT, WITHOUT EVER HAVING TALKED TO THE PATIENT, WITHOUT EVER EXAMINING THE HISTORY OF THE PATIENT HE SENDS YOU A DIAGNOSIS. AND I THINK WE NEED TO LOOK AT THE DIAGNOSIS. LOOK AT DOCTOR HOLBROOK'S DEFINITION OF A SOCIOPATH. HE SAID A CRIMINAL SOCIOPATH INVOLVES ANTISOCIAL BEHAVIOR. HE POINTED TO THE FACT THAT IN THIS PARTICULAR INSTANCE THE DEFENDANT WAS VERY MOBILE. HE SAID A CRIMINAL SOCIOPATH IS SELF SERVING, IS SELF CENTERED. THAT OTHER PEOPLE ARE NOT IMPORTANT TO HIM. AND I WOULD ASK YOU WHETHER OR NOT YOU HAVE SEEN OTHER INDIVIDUALS IN THIS TRIAL WHO MIGHT JUST AS EASILY FIT THAT DEFINITION? COULD ROBERT ROBERSON FIT THIS DEFINITION? CERTAINLY CONTINUAL USE OF ALL KINDS OF DRUGS AND THE SELLING OF DRUGS IS ANTISOCIAL CONDUCT. MR. LEITNER JUST RELATED TO THE FACT THAT SELLING OF SPEED, SELLING OF METHAMPHETAMINE CARRIES A LIFE SENTENCE. WHAT ABOUT THE MOBILITY? ROBERT ROBERSON RESTRICTED TO ANY PARTICULAR PLACE OR DID HE TELL YOU THAT HE HAD USED DRUGS IN OHIO IN HIGH SCHOOL? HE'D USED THEM IN THE ARMY IN GERMANY. HE'D USED THEM AND SOLD THEM OVER HERE IN KILLEEN AT ALL TIMES KNOWING THAT THEY WERE

AGAINST THE LAW. ARE OTHER PEOPLE IMPORTANT TO ROBERT ROBERSON? I WOULD THINK THAT FROM THE EVIDENCE THAT WE HAVE IN THIS TRIAL --

THE COURT: JUST A MINUTE PLEASE. JUST A MINUTE PLEASE. WHEN THEY GET IN WOULD YOU LOCK THE DOOR? NOBODY ELSE IS GOING IN OR OUT OF THE COURTROOM UNTIL THIS ARGUMENT IS OVER WITH. I'M SORRY, MR. BROWN.

MR. BROWN: THANK YOU, YOUR HONOR.

THE COURT: YES, SIR, PROCEED.

MR. BROWN: I SUBMIT THAT IT'S A REASONABLE DEDUCTION FROM THE EVIDENCE THAT PEOPLE ARE NOT IMPORTANT TO ROBERT ROBERSON. IS HE SELF CENTERED? DID HE LIE TO PROTECT HIMSELF TO CONCEAL HIS OWN INVOLVEMENT IN THIS? DOCTOR GRIZSON SAID THAT THE MOST OUTSTANDING, THAT THE MOST OUTSTANDING CHARACTERISTIC OF A SOCIOPATH IS THAT HE HAS NO REMORSE. HE HAS NO CONCERN FOR THE LAW. AS PUT BY DOCTOR HOLBROOK HE HAS NO CONCERN FOR THE INSTITUTIONS AND I ASK YOU THIS. HOW DOES ROBERT ROBERSON FEEL ABOUT USING AND SELLING DRUGS? DOES IT BOTHER HIM THAT THAT'S AGAINST THE LAW? NO. DOES HE FEEL GUILTY ABOUT IT? HE DIDN'T SHOW ANY ON THE STAND. AND FINALLY WHAT AND HOW DID ROBERT ROBERSON REACT WHEN HE ALLEGEDLY WAS TOLD THAT A MAN HAD BEEN MURDERED? THAT A MAN HAD BEEN SHOT. HE GOES BACK AND GETS BACK IN BED WITH DEBBIE AND GOES TO SLEEP. WOULD THAT FIT THE DEFINITION OF SOCIO-

PATH? WHAT WOULD MR. EADS OR DETECTIVE TRIPPETT SAY ABOUT MR. ROBERSON'S REPUTATION FOR BEING PEACEABLE AND LAW ABIDING IF THEY WERE CALLED TO TESTIFY SOMEWHERE? ALRIGHT, YOU SAY. BUT MR. ROBERSON DIDN'T COMMIT A MURDER. MAYBE NOT DIRECTLY, BUT IF HE HADN'T TAKEN THOMAS BAREFOOT TO HARKER HEIGHTS, TEXAS WE WOULDN'T BE HERE TODAY. DID ROBERT ROBERSON KNOW THOMAS BAREFOOT WAS GOING TO DO SOMETHING LATER? PERHAPS BURN A BUILDING? DID HE KNOW THAT THOMAS BAREFOOT HAD A GUN? WOULD YOU SAY THAT MR. ROBERSON'S CONDUCT HAS ACCELERATED? HE'S GONE FROM BEING A DRUG PEDDLER TO AN ACCOMPLICE TO MURDER AND ARSON. AGAIN, I WANT TO POINT OUT THAT THE SOLE PURPOSE IN DISCUSSING THIS IS NOT TO SHIFT THE BLAME BECAUSE YOU HAVE FOUND THOMAS BAREFOOT GUILTY OF CAPITAL MURDER. BUT WHAT WE ARE TALKING ABOUT IS THE LABEL. THE LABEL THAT TWO DOCTORS HAVE PUT ON HIM AND SAID FROM THESE FACTS WE FIND THAT HE IS A SOCIOPATH AND SINCE HE'S A SOCIOPATH THIS FOLLOWS. THE ONLY POINT THAT I'M TRYING TO MAKE IS THAT LABELING A PERSON A SOCIOPATH IS NOT SUFFICIENT TO PROVE BEYOND A REASONABLE DOUBT THAT THAT PERSON IS GOING TO COMMIT FUTURE ACTS OF VIOLENCE THAT WILL BE A CONTINUING THREAT TO SOCIETY. LET'S LOOK AT ANOTHER ASPECT OF DOCTOR HOLBROOK AND DOCTOR GRIZSON'S TESTIMONY. BOTH DOCTORS TESTIFIED THAT IF ALL OF THE FACTS ASSUMED BY THE STATE WERE NOT TRUE, THEN

THEIR OPINION WOULD NOT BE THE SAME. IF ALL OF THE FACTS IN THAT LONG HYPOTHETICAL QUESTION WERE NOT TRUE, THEN THEIR OPINION WOULD NOT BE THE SAME. NOW, LADIES AND GENTLEMEN, I DON'T KNOW HOW MANY OF THE STATE'S ASSUMPTIONS YOU AGREE WITH. I DON'T KNOW HOW MANY OF THE STATE'S ASSUMPTIONS THAT THEY SAT UP THERE AND READ TO THE DOCTORS YOU WOULD FIND TO BE UNTRUE. I DO KNOW THIS. THAT THE EVIDENCE DOES NOT SHOW THOMAS BAREFOOT TO BE A DOMINATING EGOCENTRIC WHO CONTROLS THE PERSONS AROUND HIM. WOULD A DOMINATING EGOCENTRIC PERSON, HOW WOULD THEY REACT TO SOMEBODY CALLING THEM THE PET? WOULD A DOMINATING EGOCENTRIC PERSON BE THE TYPE OF PERSON THAT WOULD FOLLOW TILLER AND ROBERSON AROUND? WOULD HE BE THE TYPE OF PERSON THAT WOULD KEEP THE TRAILER CLEAN? DID THE STATE ASK THE GOOD DOCTORS TO ASSUME THOSE FACTS ABOUT THIS MAN'S PERSONALITY? WE HAD AN ASSUMPTION THAT HE WAS AVOIDING EMPLOYMENT. BUT WHAT WAS THE TESTIMONY? THAT HE WAS EMPLOYED BEFORE HE INJURED HIS WRIST WHICH BECAME SWOLLEN AND INFECTED AND THAT THEREAFTER HE WAS UNABLE TO WORK. AND WHAT WAS THE TESTIMONY REGARDING WHAT HE DID WITH THE CHECKS THAT HE DID GET FROM HIS WORK? HE BOUGHT GROCERIES AND WHAT DID MR. ROBERSON SAY ABOUT THE MONEY THAT HE ALLEGEDLY RECEIVED TO SET THE FIRE? HE SAID THAT THOMAS BAREFOOT TOLD HIM I WANTED TO GIVE MONEY FOR THE TRAILER. I WANTED TO GIVE MONEY FOR THE

TRAILER. NOW, DOES THAT SOUND LIKE THE SELF SERVING, EGOCENTRIC TYPE INDIVIDUAL THAT THE DOCTORS HAD VISUALIZED?

HOW ABOUT THE PLANNING? DOES THE EVIDENCE REFLECT THAT THOMAS BAREFOOT BOUGHT A GUN? NO. IT REFLECTS THAT BILLY MACK GAVE IT TO HIM. DOES THE EVIDENCE REFLECT THAT THOMAS BAREFOOT BUILT THE BOMB? NO. IT REFLECTS THAT IT WAS GIVEN TO HIM. WHERE DID THOMAS BAREFOOT GET MONEY, A GUN, A BOMB, AND A ZIPPER BAG IF HE HADN'T BEEN WORKING IN A MONTH? THE ONLY REASONABLE DEDUCTION IS THAT THOSE ITEMS WERE FURNISHED TO HIM. THIS MASTER PLANNER, THOMAS BAREFOOT, DIDN'T EVEN HAVE TRANSPORTATION LINED UP FOR THIS VENTURE THAT HE WAS SUPPOSED TO BE ENGAGED IN. THE MASTER PLANNER, THOMAS BAREFOOT, LEFT THE BOMB IN THE CAR. THE MASTER PLANNER, THOMAS BAREFOOT, ACCORDING TO THE EVIDENCE HAD NO IDEA OF WHERE HE WAS GOING OR WHAT HE WAS DOING ONCE HE WAS TOLD THE POLICE WERE LOOKING FOR HIM. WHAT DID ROBERT ROBERSON SAY ABOUT OUR MASTER PLANNER THAT THE TWO DOCTORS HAVE TALKED ABOUT? HE SAID THE PET WAS IN A PANIC WHEN HE CAME TO THE TRAILER. HE SAID THE PET PUT CLOTHES IN A BOX AND THEN HE LEFT THE BOX IN THE TRAILER. HE SAID HE TOLD THE PET, GO ON UP TO TWENTY-FOUR-TEN AND WAIT FOR ME AND I'LL COME UP AND GET YOU. TO DO TO PLEASE ALWAYS, THE PET GOES UP TO TWENTY-FOUR-TEN AND ROBERSON GOES BACK TO BED. DID THE STATE ASK THE DOCTORS TO ASSUME THESE FACTS

OF MR. BAREFOOT'S PERSONALITY? THE NEXT THING WE KNOW IS THAT THOMAS BAREFOOT IS PICKED UP BY FRANKIE HERNANDEZ. AND WHAT IS THE MASTER PLANNER, WHAT IS HE DOING? HE'S WANDERING AROUND THE DOWNTOWN STREETS OF KILLEEN A FEW BLOCKS FROM THE POLICE STATION AND FRANKIE HERNANDEZ PICKS UP THIS MAN. IS THERE ANY TESTIMONY IN HERE THAT THIS MAN SOUGHT OUT FRANKIE HERNANDEZ? NO. FRANKIE SAID THAT HE CAME UP AND STARTED THE CONVERSATION AND INDICATED TO THE MAN IF YOU'LL BUY THE GROCERIES I'LL FIX THE MEAL. TOOK HIM TO HIS APARTMENT. AFTER THEY GOT TO THE APARTMENT AND AT SOME LATER TIME HOW DID THE MASTER PLANNER DECIDE HE WAS GOING TO GET OUT OF TOWN? LISTEN TO WHAT FRANKIE HERNANDEZ SAID. I PLANNED EVERY BIT OF IT. WHO SUGGESTED? I SUGGESTED HE GO TO HOUSTON. I ARRANGED HOW WE GOT TO THE BUS STATION. WHO DID THE PLANNING AND WHO WAS USING WHO IN THIS CASE? IF PLANNING IS ONE OF THE CRITERIA OF A SOCIOPATH, THEN THOMAS BAREFOOT, I'M AFRAID, FALLS FAR SHORT. LET'S LOOK AT ANOTHER PART OF THE HYPOTHETICAL QUESTION. THE STATE SAYS ASSUME THAT THOMAS BAREFOOT ESCAPED FROM PRISON IN NEW MEXICO. ALRIGHT. THAT'S RIGHT. HE'S NOT IN PRISON IN NEW MEXICO HE'S HERE TODAY SO HE GOT OUT. WE KNOW THAT. BUT YET THE EVIDENCE SAYS AND VELMA HARDESTY TESTIFIED THAT THOMAS BAREFOOT WAS IN A JAIL HE'D NEVER BEEN IN BEFORE WITH A MAN WHO HAD TWICE BEFORE ESCAPED FROM THE SAME

JAIL. WHAT IS THE REASONABLE DEDUCTION FROM THE EVIDENCE? WHO WAS LIKELY TO HAVE PLANNED THE ESCAPE? WHO WAS LIKELY TO HAVE KNOWN THAT UNOCCUPIED CELLS WERE NOT GOING TO BE LOCKED? WHO IS LIKELY TO HAVE KNOWN WHAT THE WIRES IN THE BACK LED TO AND WHERE YOU COULD GET A KNIFE TO CUT THEM? A MAN WHO WOULD LEAVE A BOMB IN A CAR OR A MAN WHO WAS SUCCESSFULLY MAKING HIS THIRD ESCAPE? BUT NONE OF THOSE FACTS WERE GIVEN TO OUR TWO DOCTORS. SO THAT LEAVES US WITH WHO IS THOMAS BAREFOOT? IS HE A MURDERER? YES, BY YOUR VERDICT YOU HAVE SAID SO. IS HE A SOCIOPATH? I WOULD SUBMIT THAT THAT'S NOT WHAT THE EVIDENCE SAYS. IS HE A WEAK INDIVIDUAL WHO USES DRUGS AND ALCOHOL AND ABUSES THEM? YES.

AND SO DOES ROBERT ROBERSON AND DONNIE RAY TILLER AND RADENE LAYTO AND DEBBIE FORBES. IS THOMAS BAREFOOT A MAN WHO ALLOWS HIMSELF TO BE EASILY LED? YES. AND WHAT DID ROBERT ROBERSON TELL YOU ABOUT THAT? HE TOLD YOU THAT WHEN THEY CAME HOME AND HE HAD ALL THIS STUFF THAT BILLY MACK HAD GIVEN HIM AND TOLD HIM HE HAD TO DO THIS THING, ROBERSON TOLD HIM HE WAS BEING SET UP ON THIS. IS HE A MAN WHO DREAMS AND SCHEMES BUT HAS PROBLEMS FOLLOWING THROUGH? THAT'S EXACTLY HOW HE WAS DESCRIBED BY THE PEOPLE WHO LIVED WITH HIM. NOT A DOCTOR WHO HAD NEVER SEEN HIM BEFORE. WHO HAD NEVER TALKED TO HIM. WHO HAD NEVER HAD ANY OPPORTUNITY TO OBSERVE ANY CLINICAL

SETTING BUT THE PEOPLE WHO LIVED WITH HIM SAID HE'S ALWAYS MAKING THESE IDLE SCHEME AND THINGS AND HE NEVER FOLLOWS THROUGH ON THEM. EVEN UP TO THE LAST. IF THE THOMAS BAREFOOT WAS THE DELIBERATE, PLANNING, SELF-CENTERED EGOCENTRIC SOCIOPATH THAT DOCTOR HOLBROOK AND DOCTOR GRIZSON VISUALIZE, DO YOU THINK THAT DONNIE RAY TILLER AND ROBERT ROBERSON WOULD HAVE TAKEN HIM SERIOUSLY? OF COURSE THEY WOULD. BUT THEY DIDN'T. BECAUSE THEY KNEW HIM ON AN EVERYDAY BASIS. AND THEY KNEW THE TYPE OF MAN THAT THOMAS BAREFOOT WAS. EVEN UP TO THE LAST ROBERT ROBERSON BELIEVED THAT BAREFOOT HAD THE GUN SIMPLY FOR SHOW. THERE IS NO EVIDENCE THAT THOMAS BAREFOOT COMMITTED ANY ACTS OF VIOLENCE WHEN HE WAS CONFINED IN LOUISIANA AFTER BEING CONVICTED ON A CHARGE OF POSSESSION OF METHAMPHETAMINE. THERE IS NO EVIDENCE THAT THOMAS BAREFOOT CAUSED ANY DISTURBANCES OR CREATED ANY PROBLEMS WHEN HE WAS IN THE JAIL IN NEW MEXICO. VELMA HARDESTY TESTIFIED TO THAT. THERE IS NO EVIDENCE THAT THOMAS BAREFOOT HAS BEEN A PROBLEM DURING THE TIME THAT HE HAS BEEN IN THE BELL COUNTY JAIL. I SUBMIT THAT THOMAS BAREFOOT WILL HAVE NO PROBLEM WITH PRISON DISCIPLINE. HE WILL NOT BE A THREAT TO COMMIT CRIMINAL ACTS. IF THIS JURY, YOU TWELVE PEOPLE DECIDE TO GIVE HIM A LIFE SENTENCE NOW, THE STATE, MR. LEITNER HAS INDICATED THERE IS ONLY ONE APPROPRIATE PUNISHMENT FOR THIS MAN AND THAT'S DEATH.

LADIES AND GENTLEMEN, THE LEGISLATURE CONSIDERED THAT LIFE IMPRISONMENT WAS AN APPROPRIATE PUNISHMENT FOR A CAPITAL CRIME.

TO SOME LIFE IMPRISONMENT IS MAYBE A WORSE SENTENCE THAN GETTING THE NEEDLE. YOU TOLD ME ON VOIR DIRE THAT YOU WOULD LISTEN TO ALL THE EVIDENCE AND YOU WOULD CONSIDER THE FULL RANGE OF PUNISHMENT. YOU WOULD CONSIDER BOTH A LIFE SENTENCE AND THAT'S EXACTLY WHAT I ASK YOU TO DO, TO KEEP YOUR PROMISE. THANK YOU.

THE COURT: THANK YOU, MR. BROWN. MR. BLYTHE.

MR. BLYTHE: MAY IT PLEASE THE COURT?

THE COURT: YES, SIR.

MR. BLYTHE: LADIES AND GENTLEMEN, YOU ALL TOLD US DURING VOIR DIRE THAT YOU UNDERSTOOD THE CAPITAL MURDER LAW AS IT APPLIED TO THE STATE OF TEXAS. YOU TOLD US THAT YOU UNDERSTOOD THAT IT REQUIRED BASICALLY THREE THINGS BEFORE AN INDIVIDUAL COULD BE SENTENCED TO DEATH. ONE WAS A CONVICTION FOR CAPITAL MURDER. TWO WAS PROOF OF DELIBERATENESS OF THIS CONDUCT AND THREE WAS PROOF OF PROBABILITY. BY UNDERSTANDING AND AGREEING TO ACCEPT THOSE THREE PREREQUISITES TO THE DEATH PENALTY YOU TOLD US FURTHER THAT YOU UNDERSTOOD THAT THE OLD EYE FOR AN EYE, TOOTH FOR A TOOTH STANDARD DID NOT APPLY ANY LONGER IN THIS STATE. IT HAS NOT APPLIED SINCE THE LEGISLATURE CHANGED THE CAPITAL MURDER LAW IN JANUARY OF

NINETEEN SEVENTY-FOUR AS YOU WERE TOLD ON VOIR DIRE. YOU UNDERSTOOD THAT THERE WAS A RANGE OF PUNISHMENT. WE ARE ASKING YOU AT THIS PHASE OF THE TRIAL TO CONSIDER THAT RANGE OF PUNISHMENT AND NOT BLOCK OUT OF YOUR MIND ANY CONSIDERATION OF THE LIFE RANGE AND ONLY CONSIDER DEATH AS THE STATE WOULD HAVE YOU DO. BUT TO CONSIDER THE POSSIBILITY OF A LIFE SENTENCE. YOU SAID YOU UNDERSTOOD THE PROBABILITY QUESTION. WE WENT INTO A GREAT AMOUNT OF DETAIL IN OUR VOIR DIRE ASKING EACH OF YOU INDIVIDUALLY BEFORE YOU WERE ACCEPTED, DO YOU AGREE WITH US THAT IT IS A DIFFICULT TASK TO PROVE BEYOND A REASONABLE DOUBT A PROBABILITY THAT AN INDIVIDUAL WILL COMMIT AN ACT OF VIOLENCE IN THE FUTURE? EVERY SINGLE ONE OF YOU WHO WERE SELECTED ON THIS JURY SAID YES, SIR, IT'S A DIFFICULT QUESTION. YOU HAD YOUR OWN WAY OF EXPRESSING IT BUT EACH OF YOU SAID BASICALLY THAT IT WOULD TAKE A LOT TO CONVINCE ME. IT'S HARD TO DO. WE TOLD YOU THERE WOULD NOT BE A CRYSTAL BALL IN THIS COURTROOM. WE TOLD YOU THERE WOULD NOT BE A FORTUNE TELLER IN THIS COURTROOM AND WE TOLD YOU THAT THE STATE COULD NOT GO OFF INTO THE FUTURE AND BRING BACK INTO THIS COURTROOM SOMEONE WHO HAD LIVED IN THE FUTURE AND CAN TELL YOU WHAT AN INDIVIDUAL HAS DONE IN THE FUTURE. MR. EADS SPENT TWO SOLID WEEKS TELLING YOU THAT IT IS IMPOSSIBLE TO PROVE A CERTAINTY. IT IS IMPOSSIBLE TO PROVE TO AN ABSOLUTE CER-

TAINTY THAT AN INDIVIDUAL IS GOING TO COMMIT AN ACT OF VIOLENCE. AND THEN HIS OWN EXPERT DOCTOR COMES INTO THIS COURTROOM AND TELLS YOU VERY CASUALLY, VERY MATTER OF FACTLY OH, I BELIEVE TO A ONE HUNDRED PERCENT ABSOLUTE CERTAINTY THAT THIS INDIVIDUAL WILL COMMIT ACTS OF VIOLENCE IN THE FUTURE.

THINK ABOUT THOSE DOCTORS. THINK ABOUT WHAT THEY CAME IN HERE AND TOLD YOU. THEY HAD NEVER BEFORE -- THEY WALKED IN THIS BACKDOOR, NEVER BEFORE LAYED EYES ON THIS DEFENDANT. THEY HAD NEVER BEFORE TALKED TO THIS DEFENDANT. THEY HAD NEVER BEFORE TALKED TO THE DEFENDANT'S FAMILY. THEY HAD NEVER BEFORE TALKED TO ANY OF HIS FRIENDS. THEY HAD NEVER BEFORE TALKED TO PAST PRISON OFFICIALS THAT HE MIGHT HAVE BEEN ASSOCIATED WITH. THEY HAD NEVER BEFORE TALKED TO ANY OF THE CURRENT JAIL OFFICIALS IN BELL COUNTY JAIL. THEY NEVER TALKED TO ANY SCHOOL PERSONNEL IN THE PAST. THEY HAD NEVER TALKED TO ANY NEIGHBORS OF THIS DEFENDANT IN THE PAST. THEY HAD NEVER TALKED TO ANY CELLMATES OF HIS IN THE PAST. ALL THEY HAD THE BENEFIT OF AS THEY SAT IN THAT CHAIR AND I TIMED IT. MR. LEITNER ASKED AN EIGHTEEN MINUTE QUESTION. MR. EADS TOOK THIRTEEN MINUTES WHEN HE ASKED HIS BECAUSE HE LEFT OUT SOME OF THE INFORMATION. IN AN EIGHTEEN MINUTE QUESTION AND A THIRTEEN MINUTE QUESTION, THEY NEVER ONCE LOOKED AT THE DEFENDANT. THEY NEVER EVEN

TURNED THEIR EYES TO LOOK AT HIM. THEY TOLD YOU IN A VERY FINAL AND A MOST CRITICAL SERIOUS DIAGNOSIS, THEIR OPINION. NOW I GUESS I'M NAIVE AND I GUESS I'M NAIVE ENOUGH TO THINK THAT A DOCTOR HAS A DUTY AND AN OBLIGATION TO HELP PEOPLE. I GUESS I'M NAIVE ENOUGH THAT I'VE ALWAYS THOUGHT THAT. I NEVER REALIZED THAT A MEDICAL DOCTOR COULD BE SO FINAL, SO CONCLUSIVE AS TO JUST TURN HIS BACK ON A LIVING HUMAN BEING, WALK AWAY FROM HIM AND SAY, HE'S HOPELESS. AND YET THAT'S WHAT THESE DOCTORS TOLD YOU. WE DON'T HAVE DEATH BY INJECTION IN THE STATE OF TEXAS. I SUBMIT TO YOU BY THE TESTIMONY OF DOCTOR GRIZSON AND DOCTOR HOLBROOK, WE HAVE DEATH BY HYPOTHETICAL QUESTION BECAUSE THAT'S ALL THEY WERE SHOWN. A HYPOTHETICAL QUESTION.

REPUTATION EVIDENCE, YOU HEARD IT. I THINK IT'S INTERESTING TO NOTE THAT MUCH OF THAT REPUTATION EVIDENCE WAS NOT FOLLOWED BY CONVICTION. NOWHERE IN THE REPUTATION EVIDENCE WERE YOU SHOWN VIOLENCE. YOU KNOW, WHAT IS REPUTATION? REPUTATION IS WHAT OTHER PEOPLE SAY ABOUT YOU. WHAT OTHER PEOPLE THINK ABOUT YOU. HOW MANY OF US JUST USING YOUR COMMON SENSE, HOW MANY OF US HAVE KNOWN PEOPLE THAT WERE BETTER PEOPLE THAN THEIR REPUTATION? HOW MANY OF US HAVE KNOWN PEOPLE WHO WERE MISJUDGED? HOW MANY OF US HAVE KNOWN PEOPLE WHO AT SOME POINT IN THEIR LIFE HAD A BAD REPUTATION AND MAYBE JUSTIFIABLY SO BUT IN LATER

LIFE CHANGED THAT LIFE AND IMPROVED THE CHARACTER THAT HAD FORMERLY SUPPORTED THAT REPUTATION? I SUBMIT TO YOU THAT REPUTATION ALONE DOES NOT INDICATE VIOLENCE.

CONVICTIONS. WE ASK EACH AND EVERY ONE OF YOU BEFORE YOU WERE SELECTED, DOES POSSESSION OF DRUGS INDICATE TO YOU A VIOLENT INDIVIDUAL? NO, SIR, MR. BLYTHE. IT DOESN'T TO ME. DOES POSSESSION OF A WEAPON INDICATE TO YOU A VIOLENT INDIVIDUAL? NO, SIR, NOT TO ME. THAT'S ALL YOU'VE BEEN SHOWN IN THE CONVICTIONS. THERE'S BEEN ACCUSATIONS BUT THE ONLY CONVICTIONS YOU HAVE BEEN SHOWN HAVE DEALT WITH NON-VIOLENT CRIMES.

UNTIL FRIDAY OF LAST WEEK THERE WAS NO CONVICTION WHATSOEVER SINCE NINETEEN SEVENTY-FIVE IN WOODWARD, OKLAHOMA. DO PEOPLE CHANGE? I GUESS THAT'S A QUESTION YOU'RE GOING TO HAVE TO ANSWER. AS YOU ARE IN YOUR TWENTIES AND THIRTIES LOOKING AHEAD TO YOUR FUTURE, YOU THINK AND YOU SPECULATE AS TO WAYS YOU WANT TO CHANGE YOUR LIFE, TO IMPROVE YOUR LIFE. CERTAINLY AT THAT AGE YOU'RE THINKING THAT CHANGE IS POSSIBLE OR YOU WOULDN'T BE SPECULATING ABOUT IT. AS YOU BECOME FORTY AND FIFTY AND SIXTY YOU LOOK BACK OVER YOUR LIFE AND I SUBMIT TO YOU THAT YOU REALIZE THAT YOU HAVE CHANGED. YOU'VE KNOWN OTHER PEOPLE WHO HAVE CHANGED IN THEIR LIFETIME. ATTITUDES CHANGE. BEHAVIOR CHANGES. LIFESTYLE CHANGES. DO WE GIVE A PERSON A CHANCE TO CHANGE OR DO WE SLAM THE

DOOR IN THEIR FACE, KILL THEM, AND SAY YOU'RE INCAPABLE OF CHANGE. IS A LIFE SENTENCE PUNISHMENT? IF YOU'RE IN YOUR TWENTIES AND YOUR THIRTIES AND YOU THINK AHEAD TO A LIFE EXPECTANCY OF SOME THIRTY-FIVE OR FORTY YEARS AND YOU THINK OF THE POSSIBILITY OF BEING IN A CELL THE REST OF YOUR NATURAL LIFE, OF BEING REMINDED DAILY WHAT YOU'VE BEEN FOUND GUILTY OF, HAVING TO LIVE WITH YOURSELF FOR WHAT YOU HAVE BEEN FOUND GUILTY OF. IF YOU'RE FORTY, FIFTY OR SIXTY AND YOU'VE BEEN IN THAT PRISON THIRTY YEARS OR TWENTY YEARS -- OR FORTY YEARS, PARDON ME. HAVE YOU BEEN PUNISHED? I THINK ANY REASONABLE PERSON WOULD AGREE THAT CONFINEMENT, RESTRICTION IS PUNISHMENT. FORCING AN INDIVIDUAL TO EXAMINE HIMSELF, TO LOOK AT HIMSELF AND TO REVIEW WHAT HE HAS DONE DAY AFTER DAY AFTER DAY THE REST OF HIS NATURAL LIFE, IS PUNISHMENT.

ON BEHALF OF THOMAS BAREFOOT I ASK YOU TO CONSIDER THE FACT THAT LIFE IS NOT AS FINAL AS SOME PEOPLE WOULD ASK YOU TO THINK IT IS. CONSIDER THE FACT THAT PEOPLE DO CHANGE. CONSIDER THE FACT THAT A LIFE SENTENCE, A DAILY REMEMBRANCE OF WHAT HE HAS DONE TO HIMSELF IS PUNISHMENT. I ASK YOU TO GO INTO THE JURYROOM AND TAKE QUESTION NUMBER TWO, DISCOVER THAT THE PROBABILITY HAS NOT BEEN PROVEN TO YOU BEYOND A REASONABLE DOUBT AND ANSWER THAT QUESTION NO. THANK YOU.

THE COURT: THANK YOU, MR. BLYTHE. MR. EADS.

MR. EADS: MAY IT PLEASE THE COURT?

THE COURT: YES, SIR.

MR. EADS: LADIES AND GENTLEMEN OF THE JURY. I ALSO, LIKE THE OTHER THREE ATTORNEYS, AM NOT GOING TO TAKE A LONG TIME STANDING HERE IN FRONT OF YOU. THERE ARE SOME THINGS THAT I VERY BRIEFLY WANT TO COVER AND SOME THINGS THAT I WANT TO MENTION TO YOU. I THINK THAT I PROBABLY SHOULD START BY SAYING THIS. THAT AGAIN AS WE SAID IN THIS COURTROOM FOR THE TWO WEEKS OF VOIR DIRE, SINCE OCTOBER THE THIRTIETH, SOME TWENTY-THREE DAYS AGO, AS MR. LEITNER AND MYSELF SAT HERE AND WE ALL TALKED TO YOU, WE TOLD YOU THAT THE BURDEN OF PROOF WAS UPON THE STATE OF TEXAS. WE TOLD YOU THAT WE ACCEPTED THAT BURDEN OF PROOF. WE WENT OVER WITH YOU THE CONSTITUTIONAL RIGHTS WE WENT OVER WITH YOU ALL THE LAW AND ALL THE ELEMENTS OF THE CASE. WE FULLY DISCUSSED THE TWO QUESTIONS WHICH WOULD BE PRESENTED TO YOU AT THIS TIME. WE HAVE TRIED TO DO, I THINK, AS MR. BLYTHE TOLD YOU DURING THE VOIR DIRE, IS WE HAVE TRIED VERY SINCERELY AND VERY HONESTLY TO PUT EVERYTHING UP FRONT. AND I THINK THAT'S JUST EXACTLY WHAT HE DID SAY. HE SAID, LET'S GET EVERYTHING UP FRONT AND LET'S REALLY TAKE A LOOK AT IT. WE TOLD YOU ON VOIR DIRE EXAMINATION NUMBER ONE THAT WE DID NOT ANTICIPATE THAT A THIRD QUESTION WOULD BE PRESENTED TO THIS JURY BECAUSE THAT THIRD QUESTION IF YOU RECALL WAS

WRITTEN ON THE BACK OF THE LARGE POSTER BOARD THAT WE HAD HERE IN THE COURTROOM THAT SAID, IF RAISED BY THE EVIDENCE AND THEN TALKED ABOUT THE PROVOCATION OF THE DECEASED, IF ANY. AND THAT QUESTION HAS NOT BEEN PRESENTED TO YOU AND WE DO NOT ANTICIPATE THAT THE EVIDENCE WOULD PRESENT THAT QUESTION TO YOU. FOR TWO WEEKS FROM OCTOBER THE THIRTY-FIRST UNTIL LAST TUESDAY, MR. BLYTHE AND MR. BROWN HAD TOLD YOU CONSTANTLY THE SAME THING THAT I TOLD YOU LAST WEEK. AND YOU HAVE GOT TO KEEP THIS IN MIND AS REASONABLE PEOPLE. IS THAT THEIR FIRST JOB IN THIS COURTROOM AS THEY TOLD YOU BEFORE IS THAT THEIR FIRST JOB IS TO DEFINE -- FIND THIS DEFENDANT NOT GUILTY. THAT IS THEIR FIRST JOB. THAT IS THEIR OBLIGATION TO --

MR. BROWN: YOUR HONOR, I OBJECT TO THIS BECAUSE THE GUILT AND INNOCENCE STAGE IS OVER WITH AND I THINK THAT THIS IS AN IMPROPER ARGUMENT AT THE PUNISHMENT STAGE OF THE TRIAL.

THE COURT: OVERRULED.

MR. EADS: THE SECOND THING THAT MR. BLYTHE AND MR. BROWN TOLD YOU WAS THIS. WAS THAT IF AND IN THE EVENT THE DEFENDANT WAS FOUND GUILTY, THEN THEIR OBLIGATION WAS TO SEE THAT THE DEFENDANT RECEIVED A LIFE SENTENCE AND NOT A DEATH SENTENCE OR NOT AN ANSWER TO THOSE QUESTIONS OF YES AND YES. NOW BOTH OF THOSE ATTORNEYS HAVE EXPRESSED THAT TO YOU. NOW AS I HAVE SAT

THROUGH THIS TRIAL FOR THE LAST TWENTY-THREE DAYS, WE AGAIN HAVE TRIED TO PUT EVERYTHING UP FRONT FROM THE VERY BEGINNING. BUT THE THING THAT I NOTICED, I THINK, PROBABLY ABOUT GERALD BROWN MORE THAN ANYTHING ELSE WHEN MR. BROWN TALKED TO YOU WAS THIS. IS THAT MR. BROWN NUMBER ONE ATTACKED ALL THE WITNESSES AGAIN. HE WENT BACK AND HE ATTACKED ROBERT ROBERSON AGAIN. THE PREVIOUS OBJECTION WAS THAT WE'RE THROUGH WITH THE GUILT INNOCENCE BUT HE JUST GOT THROUGH ARGUING ABOUT ROBERT ROBERSON AGAIN. THERE IS THEN AN ATTACK MADE UPON THE PSYCHIATRISTS. AND IF I RECALL THERE WAS AN ATTACK MADE UPON THE BALLISTICS EXPERT AS WELL. THAT EVERY WITNESS THAT THE STATE OF TEXAS HAS BROUGHT BEFORE THIS JURY HAS BEEN ATTACKED. AND AGAIN LADIES AND GENTLEMEN THAT IS THEIR JOB AS DEFENSE ATTORNEYS IN THIS COURTROOM. THAT CANNOT BE AND SHOULD NOT BE HELD AGAINST THOSE TWO MEN AND I ASK YOU NOT TO. I ASK YOU TO UNDERSTAND THAT WHEN YOU'RE ON THIS SIDE OF THE RAIL IN THIS COURTROOM, THAT WHEN WE MUST STAND BEFORE YOU AND BEFORE OUR CONSCIENCE AND BEFORE THE OTHER PEOPLE OF THIS COUNTY THAT THERE -- THERE'S A LOT OF HEAT DOWN HERE IN THE PIT SOMETIMES. AND MAYBE PERHAPS SOMETIMES WE GET EMOTIONALLY INVOLVED AND WE GET CARRIED AWAY SOMETIMES WITH WHAT WE DO. BUT WE DO WHAT WE DO BECAUSE WE BELIEVE IN WHAT WE DO. AND AGAIN IF EVER ANY WITNESS IS BROUGHT BEFORE THIS JURY

THAT HAS TOLD THIS JURY ANYTHING THAT THIS JURY DOES NOT CHOOSE TO BELIEVE, THEN AS I'VE TOLD YOU THE TWO WEEKS ON VOIR DIRE, THEN IT'S FULLY WITHIN YOUR RIGHT TO DISREGARD ANYTHING THAT THAT WITNESS HAS SAID BECAUSE YOU ARE THE EXPERTS ON PEOPLE. YOU ARE THE ONES THAT WILL JUDGE THE CREDIBILITY OF THE WITNESSES AND I BELIEVE I USED THE EXAMPLE TIME AND TIME AGAIN, I SAID YOU'RE THE ONES THAT CAN DECIDE WHETHER OR NOT YOU WANT TO GIVE THAT PARTICULAR WITNESS AN OUNCE OF BELIEVEABILITY OR A POUND OF BELIEVEABILITY. YOU CAN DECIDE. YOU CAN LISTEN TO THEM. I ASKED THE WITNESSES REPEATEDLY WHEN I WAS QUESTIONING THEM. I SAID, DON'T TELL ME, TELL THE TWELVE PEOPLE ON THIS JURY. I EVEN WALKED OVER TO THE END OF THE JURY RAIL AND I SAID TALK SO THAT ALL OF THESE PEOPLE HERE CAN TELL YOU. BECAUSE WITNESS, YOU'RE NOT TELLING ME, YOU'RE TELLING THE TWELVE PEOPLE ON THIS JURY. BECAUSE YOURS IS THE VERDICT WHICH EVERYONE MUST REMAIN WITH THROUGHOUT THE HISTORY OF THIS COUNTY.

NOW, I THINK IT'S ONLY APPROPRIATE AND FITTING THAT I MENTION SOMETHING ABOUT THE PSYCHIATRISTS. I'M GOING TO VERY BRIEFLY. I'M NOT GOING TO GET ALL HUNG UP IN TRYING TO SPEND THIRTY MINUTES UP HERE TO ARGUE WITH MR. BROWN OR WITH MR. BLYTHE. BUT I THINK THERE ARE A COUPLE THINGS THAT ARE IMPORTANT THAT I THINK SHOULD BE MENTIONED TO YOU. AGAIN NOW WE HAVE ALL THE STATE'S

WITNESSES HAVE BEEN ATTACKED NOW. EVERY SINGLE ONE OF THEM. THERE ARE SOME EXCEPTIONS AND I WANT TO MENTION THOSE TO YOU IN JUST A MOMENT. BUT IF YOU'LL REMEMBER WHAT THE PSYCHIATRISTS TOLD YOU, BOTH OF THEM. AND IF YOU'LL REMEMBER WHAT I TOLD YOU. I TOLD YOU ON VOIR DIRE, I SAID I DO NOT HAVE A CRYSTAL BALL TO COME INTO THIS COURTROOM. I CANNOT TELL YOU EXACTLY WHAT'S GOING TO HAPPEN AND I BELIEVE I USED THE ILLUSTRATION I CAN'T TELL YOU WHAT'S GOING TO HAPPEN NEXT TUESDAY AT FOUR-THIRTY. BECAUSE I CAN'T DO THAT. I DO NOT HAVE THAT CAPACITY. BUT WHAT WE HAVE DONE IS, WE HAVE DONE THIS. WE HAVE BROUGHT YOU FORTY-SEVEN WITNESSES FROM ONE TENTH OF THE CONTINENTAL UNITED STATES. WE HAVE TRACKED THIS DEFENDANT'S PATH BACK NINE YEARS TO NINETEEN SIXTY-NINE AND WE BROUGHT IT FORWARD TO YOU. AND I TOLD YOU ON VOIR DIRE, I SAID IN ANSWERING THAT SECOND QUESTION YOU CAN -- THERE ARE -- YOU CAN TAKE INTO CONSIDERATION THE TOTALITY OF THE CIRCUMSTANCES. BUT REMEMBER ONE THING THAT DOCTOR GRIZSON TOLD YOU. WHETHER YOU CHOOSE TO BELIEVE ANYTHING HE SAID, EVERYTHING HE SAID OR A LITTLE BIT OF WHAT HE SAID OR WHATEVER, I DON'T THINK THERE'S MUCH DISAGREEMENT THAT DOCTOR GRIGSON IS A WELL EDUCATED AND QUALIFIED MAN. THE SAME IS TRUE OF DOCTOR HOLBROOK. THOSE GENTLEMEN HAVE NO MOTIVE TO COME INTO THIS JURY AND JUST FLAT LIE TO THE JURY. BUT THEY BOTH TOLD YOU ONE THING AND THEY SAID

THAT SOMEONE WHO HAS A SOCIOPATHIC OR AN ANTISOCIAL PER
SONALITY OR A PSYCHOPATHIC PERSONALITY HAS ONE THING VE
MUCH IN COMMON AND I WANT YOU TO REMEMBER THIS BECAUSE
THINK IT'S SO CRUCIAL AND SO IMPORTANT TO THIS JURY.
IS DOCTOR GRIGSON SAID THAT THEY ARE VOID OF A CONSCIEN
AND LADIES AND GENTLEMEN YOU CAN TAKE INTO CONSIDERATIO
THE DEMEANOR OF THIS DEFENDANT AS THIS DEFENDANT SITS I
THE COURTROOM. BOTH OF THOSE PSYCHIATRISTS TOLD YOU
THAT. THEY BOTH TOLD YOU THAT SOMEONE WHO HAS A PSYCHO
PATHIC PERSONALITY IS A CALLOUS PERSON, IS A PERSON WHO
IS MANIPULATIVE AND USES OTHER PEOPLE FOR HIS OWN MEANS
NOW, WE KNOW THAT THOMAS ANDREW BAREFOOT SLIPPED INTO
THE AUTONOMY THAT DOCTOR JOHN HOLBROOK SAID IS VERY
CHARACTERISTIC OF THE PSYCHOPATHIC PERSONALITY. YOU
KNOW JUST BY THE VERY FACT OF THE INDICTMENT THAT THIS
MAN HAS TWO IDENTIFIES. HE HAS ONE OF THOMAS ANDREW
BAREFOOT. HE HAS ANOTHER OF DARREN CALLIER. WE KNOW
THAT THROUGH DOCTOR HOLBROOK THAT THEY ARE AN EXTREMELY
MOBILE PERSON AND YOU KNOW THROUGH THE TESTIMONY OF
TWELVE WITNESSES FROM THE STATES OF LOUISIANA, TEXAS,
OKLAHOMA, NEW MEXICO AND KANSAS THAT THAT IS WHAT THIS
DEFENDANT IS. NOW, AGAIN, YOU CAN WEIGH THEIR TESTIMON
AND YOU CAN SAY WELL, I WANT TO PUT A CERTAIN AMOUNT OF
CREDENCE HERE OR A CERTAIN AMOUNT HERE. BUT THAT'S WHA
THE DOCTORS TOLD YOU AND IF IN ANYWAY THE HYPOTHETICAL

QUESTION WHICH I READ TO DOCTOR GRIGSON WAS IN ANY WAY INACCURATE OR CONTAINED ANYTHING WHICH YOU AS A JURY FELT TO BE UNTRUE, THEN CERTAINLY YOU DISREGARD THAT QUESTION. WHAT I TRIED TO DO WAS TO RECAP THE TESTIMONY AS THAT TESTIMONY HAD BEEN PRESENTED FROM THE EVIDENCE AND FROM THE WITNESS STAND. AND IF THERE IS ANYTHING IN THERE THAT WAS MISREPRESENTED TO THIS JURY, I THINK ALL OF YOU KNOW THAT THAT CERTAINLY WAS NOT IN ANY WAY INTENTIONAL ON ANYONE'S PART. I REALLY DO BELIEVE THAT AND FEEL THAT WAY.

I ASK YOU TO LOOK AT THE HYPOTHETICAL QUESTION THAT I PRESENTED TO THESE TWO DOCTORS BECAUSE THEIR REPUTATION AND THEIR NAMES HAVE COME UNDER RATHER SEVERE ATTACK THIS MORNING. MR. BLYTHE SAID WELL, WHAT WE HAVE, WE HAVE A HYPOTHETICAL SITUATION. BUT IF YOU WILL REMEMBER I DON'T THINK IT'S DISPUTED IN THE TESTIMONY THAT I RECALL, THAT THIS DEFENDANT, THOMAS BAREFOOT, THE ONE SITTING OVER HERE WRITING ON A NOTE PAD RIGHT NOW, HAS BEEN CONVICTED FIVE TIMES IN TWO DIFFERENT STATES. THAT DEFENDANT HAS HAD TWELVE PEOPLE FROM FIVE STATES COME INTO THIS COURTROOM AND THOSE TWELVE PEOPLE WERE THE ONLY PEOPLE WHO WERE NOT ATTACKED. THEY WERE NOT ATTACKED. THERE WAS NOT ONE QUESTION ASKED OF THOSE TWELVE PEOPLE. OFFICER DANNY BROWN CAME TO YOU FROM MORGAN CITY, LOUISIANA AND NOT ONE QUESTION WAS ASKED

OF THAT OFFICER. THE SAME WITH DETECTIVE CHILDS. THE SAME WITH THE DISTRICT ATTORNEY OF WOODWARD, OKLAHOMA. THE SAME WITH THE DISTRICT ATTORNEY FROM LOS LUNAS, NEW MEXICO. THE SAME FROM MRS. GREEN FROM ODESSA. THE SAME WITH SHERIFF GASTON. NOT ONE SINGLE QUESTION WAS ASKED OF WITNESSES THAT WE HAVE BROUGHT INTO THIS COURT-ROOM FROM FIVE STATES. THEY ARE THE ONLY WITNESSES IN THIS ENTIRE TRIAL THAT THERE WAS NOT ONE QUESTION ASKED OF. EXCEPT THOSE QUESTIONS WHICH WERE PROPERLY PROPOUNDED TO THEM UNDER THE LAWS OF THE STATE OF TEXAS BY THE PRO-SECUTING ATTORNEY.

MR. BLYTHE SAYS THAT PEOPLE -- THAT PEOPLE CHANGE. I HAVE NO DOUBT THAT IN SOME CASES THAT IS TRUE. BUT WE TOLD YOU ON VOIR DIRE, WE SAID THAT IT WAS THE STATE'S INTENTION THAT IN THIS PARTICULAR CASE WITH THIS PARTICULAR DEFENDANT, THAT THE ONLY JUST, PROPER AND APPROPRIATE PUNISHMENT, AND I THINK ALL OF YOU RECALL THAT. AND I'M IN NO WAY TRYING TO STAND UP HERE AND CONTINUALLY ATTACK MR. BLYTHE OR MR. BROWN BECAUSE I DO THINK VERY HONESTLY THAT THEY HAVE DONE AN EXCELLENT JOB AS DEFENSE ATTORNEYS IN THIS CASE. I THINK THAT THEY HAVE TRIED TO IN DEPTH CROSS EXAMINE ALL WITNESSES WHICH HAVE BEEN BROUGHT BEFORE THIS JURY. BUT AT THE SAME TIME I THINK THAT WE HAVE BROUGHT THOSE WITNESSES AND WE HAVE BELLYED UP TO THE BAR SO TO SPEAK AND WE'VE SAID

HERE THEY ARE. YOU DECIDE. YOU TWELVE FOLKS ARE THE JURY. BUT MR. BLYTHE SAID THAT -- HE SAID, PEOPLE CHANGE. HE SAID ALL OF THESE WITNESSES FROM ALL OF THESE STATES, THESE DIDN'T ALL RESULT IN CONVICTIONS. THAT THIS DEFENDANT HAS NOT HAD A CONVICTION SINCE NINETEEN SEVENTY-FIVE. BLESS HIS HEART. AT THE SAME TIME WE ALL KNOW THAT THIS MAN IS A FUGITIVE FROM JUSTICE, FROM ESCAPING FROM JAIL SOME EIGHT HUNDRED MILES AWAY IN LOS LUNAS, NEW MEXICO, THAT OCCURRED IN JANUARY OF THIS YEAR. NOW, IS THAT INDICATIVE OF SOMEONE WHO HAS CHANGED THEIR PERSONALITY WHICH WE HAVE TRACED BACK NOW TO NINETEEN SIXTY-NINE? DOES THAT SHOW ANY CHANGE WHATSOEVER? DOES THE FACT THAT HE HAS COMMITTED A COLD BLOODED MURDER IN HARKER HEIGHTS INDICATE HE HAS CHANGED THAT PERSONALITY? OR IS THE FACT THAT HE WENT ON ANOTHER TWO HUNDRED MILES FROM THIS CITY TO THE CITY OF HOUSTON INDICATE THAT HIS ACTIONS WERE GOING TO CHANGE? BECAUSE AT THAT TIME THAT SAME MAN HAD ON HIS PERSON THAT SAME GUN FULLY LOADED IN HIS POCKET. AND MR. BLYTHE PROPOUNDS THE QUESTION TO YOU ABOUT THE CHANGE IN MR. BAREFOOT. BECAUSE HE HASN'T BEEN CONVICTED SINCE NINETEEN SEVENTY-NINE. I DON'T REALLY THINK THAT I NEED TO GO TOO MUCH FURTHER. I THINK THAT I DO NEED TO SAY THIS. I TOLD YOU ON VOIR DIRE, I SAID, WE'RE GOING TO BRING YOU THE TRACK RECORD OF THE INDIVIDUAL WHICH YOU CAN CONSIDER. AND WE BROUGHT YOU

THAT TRACK RECORD. WE'RE GOING TO BRING YOU HIS REPUTATION SO THAT YOU CAN DECIDE WHETHER OR NOT YOU FEEL THAT THE FELLOW YOU'RE DEALING WITH HAD A GOOD REPUTATION OR A BAD REPUTATION. I TOLD YOU THAT WE WERE GOING TO BRING YOU ANY PRIOR CONVICTIONS, IF ANY, THAT WE HAD. AND WE BROUGHT THOSE TO YOU. WE BROUGHT YOU FIVE FROM TWO DIFFERENT STATES. NOW, AS DOCTOR HOLBROOK TOLD YOU, EACH ACT IN AND OF ITSELF MAY NOT BE THAT PARTICULAR PRIOR CRIMINAL ACT OF VIOLENCE BUT DOCTOR HOLBROOK TOLD YOU THIS. HE SAID IF YOU TAKE EACH ACT AND YOU PLACE ALL THOSE ACTS TOGETHER AND YOU LOOK AT THE TOTALITY OF THE CIRCUMSTANCES, THEN YOU START TO GET A PRETTY CLEAR PICTURE OF WHAT YOU'RE DEALING WITH. AND WE KNOW THAT AS FAR BACK AS NINETEEN SIXTY-NINE, THAT THE MAN SITTING TO MY BACK CARRIED A GUN. WE KNOW THAT THAT MAN IN NINETEEN SEVENTY-FOUR IN OKLAHOMA CARRIED A SAWED OFF SHOTGUN. AND WE KNOW THAT IN AUGUST OF NINETEEN SEVENTY-EIGHT IN HARKER HEIGHTS, TEXAS, HE CARRIED A PISTOL AND HE USED IT AND HE MURDERED WITH IT. AND DOCTOR HOLBROOK TOLD YOU THAT ONE OF THE THINGS THAT IS SYMPTOMATIC AND ONE OF THE THINGS THAT THE HYPOTHETICAL QUESTION DID SHOW JUST FROM THE PRIOR CONVICTIONS NOW, WE CAN IGNORE THE FACTS OF THE CASE A MOMENT IF EVERYONE PREFERS TO DO THAT. HE SAID IT SHOWS AN ASCENDING SCALE OF VIOLENCE. STARTING IN SIXTY-NINE WHEN THIS MAN IS CONVICTED IN

CRIMINAL COURTS, HE'S CARRYING WEAPONS AND IT CONTINUES ALL THE WAY THROUGH UNTIL NINETEEN SEVENTY-EIGHT WHERE THE ULTIMATE ACT IS COMPLETED. WE'VE BROUGHT YOU, I THINK, SUFFICIENT EVIDENCE TO SHOW AS I'VE DESCRIBED TO YOU EXTENSIVELY ON VOIR DIRE THAT OUR BURDEN OF PROOF IS TO SHOW THAT THERE IS A PROBABILITY THAT IT IS MORE LIKELY THAN NOT, MORE LIKELY THAN NOT, THAT THE DEFENDANT WILL COMMIT CRIMINAL ACTS OF VIOLENCE IN THE FUTURE THAT WILL CONSTITUTE A CONTINUING THREAT TO SOCIETY. LOOK AT HIS PAST TRACK RECORD. LOOK AND SEE IF THIS IS THE FIRST TIME THIS MAN HAS EVER SAT IN A COURTROOM. CONSIDER HIS DEMEANOR AS HE SITS THERE. YOU HAVE A RIGHT TO CONSIDER HIS DEMEANOR AS HE SITS THERE RIGHT NOW. AND THE LAST THING I WANT TO SAY TO YOU IS THIS.

I THINK THAT THE TIME HAS COME IN OUR CRIMINAL JUSTICE SYSTEM WHERE THE PEOPLE OF OUR COMMUNITIES AND THE PEOPLE OF OUR COUNTIES, THAT THOSE PEOPLE NOW, THEY HAVE A RIGHT TO HAVE THEIR DEFENSE ATTORNEY IN THE COURTROOM. AND THEY HAVE A RIGHT TO HAVE SOMEONE STAND UP AND PROTECT THEIR RIGHTS. AND PERHAPS WE HAVE THE LABEL OF THE PROSECUTING ATTORNEY OR THE DISTRICT ATTORNEY BUT I SUBMIT TO YOU THIS, THAT THE TIME IS RAPIDLY APPROACHING WHERE THAT PERSON IS GOING TO HAVE TO HAVE THE LABEL TO SAY WHAT WE'RE GOING TO HAVE TO DO IS STAND UP IN THE COURTS OF OUR ENTIRE JUDICIAL SYSTEM AND PRO-

TECT NOT JUST THE RIGHTS OF THE DEFENDANT, BUT TO PROTECT THE RIGHTS OF EVERYONE. TO PROTECT THE RIGHTS OF CARL LEVIN. TO PROTECT THE RIGHTS OF HIS FAMILY. TO PROTECT THE RIGHTS OF THE PEOPLE IN HARKER HEIGHTS AND THEY HAVE TWO PATROLMEN OUT THERE FOR A TOWN OF TEN THOUSAND PEOPLE. THAT IS ONE POLICE OFFICER FOR EVERY FIVE THOUSAND. BUT I THINK THAT THE TIME IS GOING TO COME IN OUR SOCIETY WHERE INSTEAD OF HAVING A PROSECUTING ATTORNEY AND A DEFENSE ATTORNEY, WE ARE GOING TO HAVE THE DEFENSE ATTORNEY FOR THE DEFENDANT AND THE DEFENSE ATTORNEY FOR THE PEOPLE OF THE STATE OF TEXAS. THANK YOU.

THE COURT: THANK YOU, MR. EADS. NOW EVERYONE REMAIN SEATED WHILE THE JURY FILES OUT PLEASE. IF YOU WOULD PLEASE, LADIES AND GENTLEMEN, YOU MAY TAKE THE CHARGE AND THE EXHIBITS THAT YOU WISH TO TAKE WITH YOU INTO THE JURYROOM AND WE WILL BE IN RECESS WHILE THE JURY IS OUT. IF YOU WILL PLEASE, FOLLOW THE BAILIFF.

JURY OUT AT TEN-TWELVE

THE COURT: WE WILL BE IN RECESS WHILE THE JURY IS OUT. THANK YOU.

ly shows he was not the owner on that date.[1]

The State argues, "The evidence indicates that Mr. Martinez had rented the apartment but had not yet moved into it." We do not see how such a conclusion can be drawn from the testimony set out above, and it certainly is not established by proof beyond a reasonable doubt. The evidence is insufficient to support the conviction.

The judgment is reformed to show an acquittal. Cf. *Escobar v. State*, Tex.Cr. App., 578 S.W.2d 139.

Emmett Murray HOLLOWAY, Jr., Appellant,

v.

The STATE of Texas, Appellee.

No. 64411.

Court of Criminal Appeals of Texas, En Banc.

April 1, 1981.

Defendant was convicted before the 124th Judicial District Court, Gregg County, David Moore, J., of capital murder, and he appealed. The Court of Criminal Appeals, Clinton, J., held that: (1) defendant's objection to psychiatrist's "competency" as a witness was sufficient where none of the requisites for admissibility of psychiatrist's opinion testimony that there was probability that defendant would commit criminal acts of violence constituting a continuing threat to society had yet been established and an objection to the "relevance" of such an opinion, formed by psychiatrist who had never examined defendant and who knew nothing of his psychiatric history, sufficiently apprised trial court of contention that the proffered opinion had not been shown to have any probative value, and (2) such opinion testimony was without probative value and was not admissible where it was assertedly formed on basis of psychiatrist's conversations with "people who knew [defendant]."

Reversed and remanded.

1. Criminal Law ⇐469

Generally, opinion testimony is inadmissible, but if jurors are not competent to infer, without the aid of greater skill than their own, the probable existence of the facts to be ascertained, or the likelihood of their occurring from other facts actually proved, expert opinion evidence is rendered admissible.

2. Criminal Law ⇐481

Burden of establishing admissibility of an expert's opinion rests on party offering such evidence.

3. Criminal Law ⇐736(1)

Whether subject in issue is one on which expert opinion would assist the jury and, if so, whether the proffered witness possesses the requisite qualifications are preliminary questions for the trial court to decide and are not a matter of "weight" only, to be determined by the jury.

4. Criminal Law ⇐478(1)

Mere fact that witness has professional credentials or occupational status in a calling relating to matter in question is insufficient to qualify him to give opinion testimony, but, rather, it must be shown that he possesses special knowledge on the specific matter about which his expertise is sought.

1. Appellant in his brief points out that one of the officers testified that he found out Juan Martinez lived at the apartment, and argues this was hearsay without probative value, citing *Ex parte Martinez*, Tex.Cr.App., 530 S.W.2d 578. The State in its brief, in apparent recognition of this rule, does not argue that this hearsay should be considered. It is presumed that the trial court disregarded any inadmissible evidence. Also, there is no indication that the officer knew the Juan Martinez who testified, or the Juan Martinez he heard of in his investigation was the same as the one who testified.

5. Criminal Law ⇐486

Even though a witness' qualifications as an expert is established or admitted, his opinion may be inadmissible if there is no evidence of technical or scientific support for it.

6. Criminal Law ⇐478(1)

Special knowledge which qualifies a witness to give an expert opinion may be derived entirely from a study of technical works, or specialized education, or practical experience or varying combinations thereof; what is determinative is that his answers indicate to the trial court that he possesses knowledge which will assist the jury in making inferences regarding fact issues more effectively than the jury could do so unaided.

7. Criminal Law ⇐469

Expert opinion evidence must be tested and limited by same considerations as other evidence in determining its admissibility, such as whether its probative value outweighs its prejudicial potential.

8. Criminal Law ⇐469

Admission of expert's opinion is dependent on offering party's showing that it is appropriate because of unfamiliarity of lay jurors with a body of expertise which is relevant to resolution of the litigation.

9. Criminal Law ⇐486

Relevance of an opinion to an issue in litigation is established only if expert's conclusion is based on facts either proved or assumed.

10. Criminal Law ⇐486

Objection to relevance of an expert opinion will be overcome if offering party can demonstrate that it is based only in part on records or reports which have a high degree of reliability such as business records or official records.

11. Criminal Law ⇐695(4)

In capital murder case in which psychiatrist testified that there was a probability that defendant would commit criminal acts of violence constituting a continuing threat to society, defendant's objection to psychiatrist's "competency" as a witness was sufficient where none of the requisites for admissibility had yet been established and an objection to the "relevance" of such an opinion concerning probability of defendant's future conduct formed by such psychiatrist, who had never examined defendant and knew nothing of his psychiatric history, sufficiently apprised trial court of contention that the proffered opinion had not been shown to have any probative value. V.T.C.A., Penal Code §§ 19.03, 19.03(a)(1); Vernon's Ann.C.C.P. arts. 37.071, 37.071(b, e, f).

12. Criminal Law ⇐486

Though duly qualified expert witness may give his opinion based on sufficient relevant facts, those facts must be either within his personal knowledge, or assumed from common or judicial knowledge, or established by evidence.

13. Criminal Law ⇐486

In capital murder case, psychiatrist's opinion testimony was without probative value and was not admissible where psychiatrist had never examined defendant and psychiatrist's opinion was assertedly formed on basis of his conversations with "people who knew [defendant]."

Ebb B. Mobley, Court-appointed, Longview, for appellant.

Odis R. Hill, Dist. Atty., Longview, Robert Huttash, State's Atty., Austin, for the State.

Before the court en banc.

OPINION

CLINTON, Judge.

This automatic appeal[1] results from a conviction for the offense of capital murder pursuant to V.T.C.A. Penal Code, § 19.03(a)(1).[2] Upon the jury's return of affirm-

1. See Article 37.071(f), V.A.C.C.P.

2. Section 19.03, supra, provides in relevant part:

ative answers to two special issues submitted, Article 37.071(b), V.A.C.C.P., appellant's punishment was assessed at death. Article 37.071(e), supra.

Briefly, the evidence adduced at the guilt-innocence stage of trial reflected that in the early morning hours of November 22, 1977, appellant successively robbed two different convenience store clerks at gun point, at approximately 12:20 a. m. and 1:15 a. m. Accompanied by Marilyn Gail Griffin and driving her car, appellant saw a police car, its red lights and spot light on, pull out behind him. As appellant pulled over, police officer Marshall Sowders exited his car and called out for appellant to do likewise. Officer Sowders walked toward appellant, and according to Griffin, did not have his weapon drawn.

Marilyn Griffin testified that at this point she heard five shots fired and saw Officer Sowders thrown back and then fall. Appellant jumped back into the car and drove off at a rapid rate of speed, telling Griffin that he "knew what he did" and that the officer "wasn't the only one that needed it." Appellant then handed Griffin the .357 caliber magnum pistol and told her to reload it as they were pursued by more police officers. Eventually a police car pulled up beside them and as an officer aimed a shotgun out the window at appellant, he stopped the car. Appellant was ordered out of the car and right after he exited, Marilyn Griffin was shot by an officer. As a result, Griffin was confined to a wheelchair.

At the punishment phase, the State called James P. Grigson, M.D., a psychiatrist, for the purpose of adducing expert opinion testimony that there is a probability that appellant would commit criminal acts of violence constituting a continuing threat to society.[3] The State then rested its case on the punishment issues, and appellant called his sister, Jerida Holloway McCartney, a pharmacist. Mrs. McCartney testified that the twenty four year old appellant had no prior criminal record and had completed one year of college.

The father of the witness and appellant had died in a mental institution for war veterans after having been institutionalized for three years, in 1973. According to McCartney, her father had a criminal record and had served time in prison. Appellant, she testified, had attempted to join the military, but was unable to meet medical criteria for admission due to disabilities suffered at the age of fourteen as a result of a motorcycle accident. Appellant's primary and lingering injury was a subdural hematoma, a blood clot on his brain; from brain surgery, appellant had suffered complications which precluded his entry into the Armed Forces. According to McCartney, scar tissue from the brain surgery had caused a permanent neurological malfunction, the effects of which were similar to epilepsy.

The witness testified that she had seen her brother suffer seizures which rendered him unconscious for times ranging between twelve and twenty four hours, after which for three or four days he would lose his orientation and be unable to remember anything. Appellant had been hospitalized in both Confederate Memorial in Shreveport,

"(a) A person commits an offense if he [intentionally or knowingly causes the death of an individual] under Section 19.02(a)(1) of this code and:

(1) The person murders a peace officer . . . who is acting in the lawful discharge of an official duty and who the person knows is a peace officer. . . ."

3. Article 37.071, supra, provides in germane portion:

"(a) Upon a finding that the defendant is guilty of a capital offense, the trial court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment. * *

(b) On conclusion of the presentation of the evidence, the court shall submit the following issues to the jury:

* * * * * *

(2) *whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society*; . . . ."

(All emphasis is supplied throughout by the writer of this opinion unless otherwise indicated.)

as well as Schumpert Sanatorium, until he was transferred to a charity hospital when insurance coverage ran out. Appellant had a sporadic work history due to his inability to maintain a job after periodic incapacitation.

By his first ground of error, appellant contends that the trial court abused its discretion in permitting the State to adduce the opinion testimony of Dr. Grigson regarding appellant's future dangerousness. In argument before this Court, the State contended that appellant's objection varied from his ground on appeal.

The record reflects, however, that defense counsel stated prior to Dr. Grigson's taking the stand:

> "We have a specific competency objection on this witness. Competency is to be determined by the Court prior to the witness' taking the stand."

Thereafter, Dr. Grigson was called for purposes of establishing the admissibility of his testimony outside the presence of the jury.

After he was sworn, in response to questions by the prosecutor, Dr. Grigson recited his educational and practical experience background and enumerated his licenses and certifications in the field of psychiatry; immediately thereafter, the district attorney declared, "Your Honor, based upon those qualifications, we submit that this witness is competent to express an opinion concerning the field of psychiatry." Defense counsel then elicited from Dr. Grigson the fact that he had made no psychiatric or medical examination of the accused.

Defense counsel again objected to the competency of the witness, asserting that "his testimony would be irrelevant to any issue before [the] jury," and that any opinion Dr. Grigson would give, would be based upon hearsay, thereby denying appellant his rights to cross examination and effective assistance of counsel. In response, the trial court inquired of the prosecutor whether he intended to elicit the opinion based upon a hypothetical question.

The District Attorney replied in the negative and advised the court that the State would show Dr. Grigson's opinion to be based upon interviews with "people who knew [appellant] prior to and subsequent to this offense," the arresting and interrogating officers involved, "people in the jail," and thorough reviews of the offense report, as well as medical information reflected upon a form appellant had filled out at the time of his admission to county jail.

The trial judge ruled that the opinion testimony would be received, but he would not permit the witness to testify as to the content of conversations on which the opinion was based. Appellant again voiced his several objections.

We are constrained to agree with appellant that the trial court abused its discretion in permitting Dr. Grigson to testify for the reasons about to be delineated.

[1] Initially we note that it is a general rule of evidence that opinion testimony, like hearsay, is inadmissible because it is not based upon personal knowledge of the existence of facts capable of being proved by direct evidence.[4] Clearly, there is nothing to be gained by permitting a witness to proffer an opinion on a subject when any other person in the courtroom, any member of the jury, could form an opinion on the issue equally readily and with the same degree of logic as the witness.[5] But when the jurors are not competent to infer, without the aid of greater skill than their own, the probable existence of the facts to be ascertained, or the likelihood of their occurring from other facts actually proved, ex-

4. See generally J. Lawson, *Expert and Opinion Evidence* (1886), [hereinafter cited as Lawson]; see also *Loper v. Andrews*, 404 S.W.2d 300 (Tex.1966).

5. See *Green v. Houston Belt & Terminal Ry. Co.*, 558 S.W.2d 127 (Tex.Civ.App.—Houston 1977, no writ); *Galveston H. & S. A. Ry. v. Sweeney*, 6 Tex.Civ.App. 173, 24 S.W. 947 (1894, no writ); *Radam v. Capital Microbe Destroyer Co.*, 81 Tex. 122, 16 S.W. 990 (1891); and *Shelley v. City of Austin*, 74 Tex. 608, 12 S.W. 753 (1889).

pert opinion evidence is rendered admissible.[6]

> "The opinions of experts are received upon the theory that, by reason of study or experience, they have upon *the subject of inquiry* a special knowledge which *jurors generally do not possess* and are therefore *better equipped* to draw conclusions from the facts *than the jurors themselves.* * * * [T]he practical test for receiving such opinion is: On the *subject in issue* can the jury receive any *appreciable aid* from the person offered?"[7]

R. Ray, Law of Evidence, 2 *Texas Practice* § 1400 (3rd ed. 1980) [hereinafter cited as Ray].

[2, 3] Because of the theory upon which a purported expert's testimony may be admitted, the burden of establishing the admissibility of the expert's opinion rests on the party offering such evidence;[8] thus, whether the subject in issue is one upon which expert opinion would assist the jury and, if so, whether the proffered witness possesses the requisite qualifications, are preliminary questions for the trial court to decide and are not a matter of "weight" only, to be determined by the jury.[9]

[4–6] Merely that the witness has professional credentials or occupational status in a calling which relates to the matter in question is insufficient to qualify him. Rather, it must be shown that he possesses special knowledge upon the specific matter about which his expertise is sought.[10] And indeed, "even though a witness' qualifications as an expert may be established or admitted, his opinion may be inadmissible if there is no evidence of technical or scientific support for it."[11] Ray, § 1400 at 26–27. The special knowledge which qualifies a witness to give an expert opinion may be derived entirely from a study of technical works, or specialized education, or practical experience or varying combinations thereof;[12] what is determinative is that his answers indicate to the trial court that he possesses knowledge which will assist the jury in making inferences regarding fact issues more effectively than the jury could do so unaided. Ray, § 1401; *Moore v. Grantham*, 599 S.W.2d 287 (Tex.1980); *Bowman and Blatz v. Raley*, 210 S.W. 723 (Tex.Civ.App.—San Antonio 1919, no writ); see also *Lawson*, supra.

6. *Lawson*, supra; *Loper v. Andrews*, 404 S.W.2d 300 (Tex.1966); *Union Bus Lines v. Moulder*, 180 S.W.2d 509 (Tex.Civ.App.—San Antonio 1944, no writ); and *Cadena v. State*, 94 Tex.Cr.R. 436, 251 S.W. 225 (1923).

7. See also *Burns v. Bridge Engineering Corp.*, 465 S.W.2d 427 (Tex.Civ.App.—Houston 1971, writ ref'd n.r.e.); and *Koonce v. Perales*, 268 S.W.2d 683 (Tex.Civ.App.—San Antonio 1954, no writ).

8. E. g., *Griffin v. State*, 116 Tex.Cr.R. 497, 31 S.W.2d 812 (1930); *Holder v. State*, 81 Tex. Cr.R. 194, 194 S.W. 162 (1917); Ray, § 1401, at 28.

9. Ray, § 1401. See also *Trick v. Trick*, 587 S.W.2d 771 (Tex.Civ.App.—El Paso 1979, writ dism'd); *United States Fire Ins. Co. v. Stricklin*, 556 S.W.2d 575 (Tex.Civ.App.—Dallas 1977, writ ref'd n. r. e.); *Beard Drilling Co. v. Steeger*, 361 S.W.2d 888 (Tex.Civ.App.—Houston 1962, aff'd in part, revs'd on other grounds, 371 S.W.2d 684); and *Bowman and Blatz v. Raley*, 210 S.W. 723 (Tex.Civ.App.—San Antonio 1919, no writ).

10. Ray § 1401; see, e. g., *Winegarner v. State*, 505 S.W.2d 303 (Tex.Cr.App.1974) [in which psychiatrist's testimony properly excluded when purported expert opinion sought to establish the accused's lack of intent to murder as being "based on conjecture"]; and *Jones v. Traders & General Ins. Co.*, 140 Tex. 599, 169 S.W.2d 160 (1943) [in which physician's opinion that deceased was probably insane because of witness' personal belief that anyone who would commit suicide is "off balance," held to be no evidence].

See also *Moore v. Grantham*, 599 S.W.2d 287 (Tex.1980); *Hutchins v. Humble Oil & Refining*, 161 S.W.2d 571 (Tex.Civ.App.—Galveston 1942, writ ref'd w. o. m.); *San Marcos Oil Mill v. Soyars*, 265 S.W. 173 (Tex.Civ.App.—Austin 1924, no writ); *Southern Telegraph and Telephone Co. v. Evans*, 54 Tex.Civ.App. 63, 116 S.W. 418 (1909, writ ref'd).

11. See, e. g., *Winegarner v. State*, supra; *Jones v. Traders & General Ins. Co.*, supra; and n. 10, *ante*; see also *Union Bus Lines v. Moulder*, supra; and *Simmons v. State*, 79 Tex.Cr.R. 492, 186 S.W. 325 (1916).

12. See *Beard Drilling Co. v. Steeger*, supra; and *Bowman and Blatz v. Raley*, supra; cf. *Taubert v. Earle*, 133 S.W.2d 145 (Tex.Civ.App. —Fort Worth 1939, writ ref'd).

basis of conversations had with "people who knew appellant" [17]—clearly did not meet or remove the ground of objection. Indeed, recognizing the unreliability of Dr. Grigson's sources, the trial court instructed counsel not to "go into" those conversations.[18] Compare *Moore v. Grantham*, supra.

[12, 13] We therefore disagree with the State that appellant's objection at trial varied from his assertion on appeal. Further, we hold that while a duly qualified expert witness may give his opinion based upon sufficient relevant facts, those facts must be either within his personal knowledge, or assumed from common or judicial knowledge, or established by evidence; "his opinion is without value, and is inadmissible, if based upon facts and circumstances gleaned by him from ex-parte statements of third persons, and not established by legal evidence before a jury trying the ultimate issue[ ] to which the opinion relates." *Reed v. Barlow*, supra at 935, reiterated in *Moore v. Grantham*, supra, at 290.

For the admission into evidence of an opinion which met none of the criteria discussed herein, the judgment of conviction is reversed and this cause is remanded to the trial court. Cf. *Porter v. State*, 578 S.W.2d 742 (Tex.Cr.App.1979).

17. These people were later revealed to be appellant's co-defendant—who was crippled as a result of the capital murder transaction—and her mother; a victim of one of the robberies which preceded the capital murder; and, the arresting and interrogating police officers.

18. But under this ruling how could defense counsel hope to challenge the validity and reliability of the opinion testimony before the jury, knowing it to be based on inadmissible information, without "opening the door" to the admission of the evidence? See, e. g., *Rodriquez v. State*, 597 S.W.2d 917 (Tex.Cr.App.1980), which illustrates how crucial it is for the trial court to allow thorough and careful exploration of the admissibility of expert opinion testimony, when an objection is voiced to the competence of the witness or the relevance of the opinion to be offered, outside the presence of the jury.

Also in this regard, see n. 14 *ante*, and accompanying text.

Ex parte Randall KING.

No. 66936.

Court of Criminal Appeals of Texas, En Banc.

April 1, 1981.

On an application for writ of habeas corpus, the Court of Criminal Appeals, Teague, J., held that continuance of trial on basis that defendant's attorney was member of legislature and was in actual attendance at session did not constitute good and sufficient cause to revoke bail posted by defendant or to increase amount of bail.

Order accordingly.

Bail ⇐53, 73.1(1)

Continuance of criminal trial on basis that defendant's attorney was member of legislature and was in actual attendance at session of legislature did not constitute good and sufficient cause to revoke bail posted by defendant or to increase amount of bail.

Douglas Tinker, Corpus Christi, E. X. Martin, III and Samuel W. Hudson, III, Dallas, for appellant.

William Mobley, Jr., Dist. Atty. and Bill May, Asst. Dist. Atty., Corpus Christi, Robert Huttash, State's Atty., Austin, for the State.

Before the court en banc.

175 Cal.Rptr. 738

The PEOPLE, Plaintiff and Respondent,

v.

David Leslie MURTISHAW, Defendant and Appellant.

Cr. 20958.

Supreme Court of California, In Bank.

July 27, 1981.

As Modified Aug. 26, 1981.

The Superior Court, Kern County, John D. Jelletich, J., convicted defendant of three counts of first-degree murder and one count of assault with intent to commit murder, and defendant appealed. The Supreme Court, Tobriner, J., held that: (1) error, if any, in submitting issue of felony-murder to jury was not prejudicial; (2) defendant voluntarily waived his *Miranda* rights when he made statements to sheriff's deputies; (3) deliberate police destruction of their notes of interview did not render defendant's admissions of the killings inadmissible; (4) defendant was barred from raising on appeal issue concerning prosecutor's references to witness' testimony as uncontradicted; (5) trial court did not err in failing to instruct sua sponte on doctrine of unreasonable self-defense; (6) erroneous failure to explain to jury that crime of murder requires express malice was not prejudicial since overwhelming evidence demonstrated that defendant acted with express malice; (7) trial court did not commit reversible error in denying defense motion for discovery of prosecution investigations and records relating to jury panel or for funds to hire investigator to investigate prospective jurors; and (8) trial court erred in permitting psychopharmacologist to testify as to his opinions concerning defendant's future conduct in prison.

Judgment imposing death penalty reversed; judgment of guilt affirmed.

Richardson, J., concurred in part and dissented in part and filed opinion.

1. Criminal Law ⇐419(10)

In prosecution for murder defendant's statements made to psychological experts that he regularly used PCP and marijuana and occasionally used other drugs as well were admissible only to serve as basis for expert opinion.

2. Homicide ⇐286(3)

Evidence was sufficient to sustain conviction of premeditated murder.

3. Homicide ⇐142(1)

Under an accusatory pleading charging murder in short form prescribed by penal code sections, accused may be convicted of first-degree murder on theory that murder was committed in the perpetration of a felony, and thus a defendant, charged with murder, is on notice that prosecution may seek to prove that charge by showing that homicide occurred during commission of enumerated felony. West's Ann.Pen.Code, §§ 951, 952; § 190.4 (Repealed).

4. Indictment and Information ⇐71.4(5)

Prosecution's failure to give defendant earlier notice of felony-murder theory did not impair presentation of defendant's defense, even though testimony at preliminary hearing arguably did not alert defendant to need to defend against such theory, where defendant, when apprised of prosecution's felony-murder theory, did not request continuance to prepare defense against that theory and on appeal defendant did not suggest any way in which injection of felony-murder into case affected defense. West's Ann.Pen.Code, §§ 951, 952; § 190.4 (Repealed).

5. Homicide ⇐235

Evidence was sufficient to sustain conviction of murder on felony-murder theory, in view of testimony indicating that defendant was thinking of stealing automobile.

6. Criminal Law ⇐409(3)

Prosecution must prove voluntariness of admissions by a defendant beyond a reasonable doubt.

EXHIBIT "3"

7. Criminal Law ⇐409(3)

Prosecution bears burden of proving waiver of *Miranda* rights beyond a reasonable doubt with respect to admissions as well as confessions.

8. Criminal Law ⇐412.1(1)

Trial court properly determined that defendant voluntarily made statements to deputy sheriffs, where defendant showed no unwillingness to admit to the killings and cooperated without hesitation, and defendant's lack of food or sleep was not the result of police misconduct.

9. Criminal Law ⇐412.1(4)

Officers had no duty to tape record initial interview of defendant.

10. Criminal Law ⇐1169.12

Although investigator's failure to record interview with defendant and officers' destruction of handwritten notes made it impossible for defense to verify whether typed transcript reflected handwritten notes or reality of interrogation, admission of defendant's statements, in which defendant admitted killings, did not warrant reversal, where statements were primarily exculpatory and, with respect to charge of first-degree murder, statements constituted admissions rather than confessions and where uncontradicted eyewitness testimony established that defendant fired the fatal shots.

11. Criminal Law ⇐516

A "confession" must encompass all elements of a crime.

See publication Words and Phrases for other judicial constructions and definitions.

12. Criminal Law ⇐1169.12

Although improper introduction of a confession is reversible error per se, wrongful introduction of an admission is not reversible if People can show beyond reasonable doubt that error complained of did not contribute to the verdict.

13. Criminal Law ⇐728(2)

Defendant waived his right to object to alleged prosecutorial misconduct involving comments by prosecutor which assertedly reflected on defendant's failure to testify, where defense counsel failed to object to any of the asserted improper comments of the district attorney and timely objection and admonition would probably have cured effect of the misconduct.

14. Criminal Law ⇐721(1)

Prosecutorial comment which draws attention to a defendant's exercise of his constitutional right not to testify and which implies that jury should draw inferences against defendant because of his failure to testify, violates defendant's constitutional rights.

15. Criminal Law ⇐1171.3

District attorney's statement that "I accept the testimony" of prosecution witness that defendant intended to steal car did not warrant reversal, although if language was intended to indicate prosecutor's personal belief in the truth of the testimony it was improper.

16. Courts ⇐100(1)

Even though record contained substantial evidence to support finding that defendant acted under unreasonable belief that his life was in danger, finding under which *People v. Flannel* decision would have reduced crime from murder to manslaughter, trial court did not err in failing to give sua sponte instruction on doctrine of unreasonable self-defense, where case was tried prior to finality of *Flannel* decision.

17. Criminal Law ⇐641.13(2)

Defense counsel's failure to request instruction on unreasonable self-defense did not require finding that defendant was deprived of the effective assistance of counsel, where doctrine of unreasonable self-defense was one which, owing to its uncertain and undeveloped character, might well have been overlooked by a reasonably competent practitioner.

18. Criminal Law ⇐1208(3)

Where repeal of statute governing offense of assault with intent to commit murder was intended to insure that all attempted murders would be punished under gener-

al attempt statute regardless of whether they involved assaults and legislative purpose was not to eliminate sanctions for persons committing acts formerly proscribed by assault with intent to commit murder statute, repealing statute did not operate retroactively to mitigate sentences of persons who committed assaults with intent to commit murder before January 1, 1981, effective date of repealing statute. West's Ann.Pen.Code, § 664; § 217 (Repealed).

19. Homicide ⇐310(1)

Trial court erred in failing to instruct jury that only express malice could support conviction for assault with intent to commit murder and by failing to limit definitions of implied malice and felony-murder by explaining that those concepts were inapplicable to assault charge.

20. Homicide ⇐84

Concept of felony-murder is clearly inapplicable to crime of assault with intent to commit murder.

21. Homicide ⇐87

Concept of implied malice, insofar as it permits conviction without proof of intent to kill, is inapplicable to charge of assault with intent to commit murder.

22. Homicide ⇐13

Implied malice, as defined in approved jury instruction, cannot coexist with a specific intent to kill since once a defendant intends to kill, any malice he may harbor is necessarily express malice.

23. Homicide ⇐341

Trial court's erroneous failure to explain to jury that crime of assault with intent to commit murder required express malice and could not rest upon theories of implied malice or felony did not warrant reversal, in view of overwhelming evidence demonstrating that defendant acted with express malice.

24. Criminal Law ⇐627.6(6)

Following finality of instant opinion, trial judge will have discretionary authority to permit defense access to jury records and reports of investigations available to the prosecution.

25. Costs ⇐302.3
Criminal Law ⇐627.6(5)

Trial judge did not abuse his discretion in denying defense motion for discovery of prosecutorial investigations of prospective jurors or for $1,000 to enable defense to conduct a similar investigation, even though district attorney's office had conducted field investigations of prospective jurors and had maintained records showing how the jurors had voted in prior cases and whether they had arrest records. West's Ann.Const. Art. 6, § 13.

26. Criminal Law ⇐986.2(1), 1177

In penalty phase of homicide prosecution, trial court committed reversible error in admitting, over objection, testimony of psychopharmacologist forecasting that defendant would commit violent and possibly homicidal acts in prison; admission of such testimony required reversal of verdict at penalty trial.

27. Criminal Law ⇐986.2(1)

In penalty phase of homicide prosecution, admission of testimony of psychopharmacologist did not violate safeguards established in *In re Spencer* since defendant raised issue of diminished capacity and parties stipulated that evidence offered at guilt phase could be considered by jury at penalty trial. West's Ann.Pen.Code, § 190.3(c, g) (Repealed).

28. Criminal Law ⇐986.2(1)

People did not have constitutional right to introduce expert testimony in penalty phase of homicide prosecution predicting that defendant would probably commit future criminal acts, in view of fact that prejudicial impact of testimony outweighed its marginal relevance and questionable reliability.

29. Criminal Law ⇐1159.2(2)

When a jury decides an issue of guilt, an appellate court can reverse that conviction if it rests on evidence which is entitled to little weight, evidence which is not of ponderable legal significance, reasonable in nature, credible, and of solid value.

30. Criminal Law ⇐986.2(1)

Expert forecasts of future violent acts have little relevance in determination of penalty. West's Ann.Pen.Code, § 190.3 (Repealed).

31. Criminal Law ⇐1177

Erroneous admission in penalty phase of homicide prosecution of psychopharmacologist's forecast that defendant would commit violent and possibly homicidal acts in prison was prejudicial, where testimony was principal prosecution penalty phase evidence and jury deliberated two full days before deciding on death penalty, suggesting that issue of penalty was close.

Quin Denvir, State Public Defender, under appointment by the Supreme Court, Laurance S. Smith and Stephen Berlin, Deputy State Public Defenders, for defendant and appellant.

George Deukmejian, Atty. Gen., Robert H. Philibosian, Chief Asst. Atty. Gen., Arnold O. Overoye, Asst. Atty. Gen., Edmund D. McMurray, Vincent J. Scally, Jr., and Nancy L. Sweet, Deputy Attys. Gen., for plaintiff and respondent.

TOBRINER, Justice.

On April 9, 1978, defendant and Gregory Lufenberger, his brother-in-law, went shooting in the Mojave Desert. They chanced upon four college students who were filming a movie. Several hours later, as the students prepared to leave, defendant began to fire at them, killing three of the students and injuring the fourth.

Defendant admitted the shooting but claimed diminished capacity. The jury rejected the defense and found him guilty of three counts of first degree murder, and one count of assault with intent to commit murder. The jury found the special circumstance of multiple murder and returned a verdict imposing the death penalty. The trial court denied defendant's motions for modification of sentence and for a new trial. Defendant's appeal to this court is automatic. (Pen. Code, § 1239, subd. (b).)

The State Public Defender, representing defendant on this appeal, presents a number of significant contentions in his behalf. We state our conclusions respecting those contentions.

1. Defendant contends that no substantial evidence supports the verdict of first degree murder on either a theory of premeditated murder or a theory of felony murder. We explain that the evidence is clearly adequate to show a deliberate and premeditated killing. Although the evidence that defendant killed in the course of an attempt to rob the victims of their automobile is marginal, consisting almost entirely of Lufenberger's testimony that defendant earlier in the day said "he wanted to steal the car or something" in view of the convincing evidence of premeditated murder, any error in submitting the issue of felony murder to the jury was not prejudicial.

2. The day after the crime sheriff's deputies interviewed defendant at the Norwalk police station, then took him to Bakersfield where they taped a second interview. In both interviews defendant admitted the killings, but did not admit to malice, premeditation, or to intending to steal the car. We conclude that defendant voluntarily waived his *Miranda* rights and acknowledged killing the victims.

Defendant contends that the deliberate police destruction of their notes of the Norwalk interview violated the requirements of *People v. Hitch* (1974) 12 Cal.3d 641, 117 Cal.Rptr. 9, 527 P.2d 361, requiring suppression of the Norwalk interview and arguably the Bakersfield interview as well. We observe, however, that apart from admitting the killings, which were proven by eyewitness testimony in any case, defendant's statements were largely exculpatory: the statements clearly did not admit all elements of first degree murder. Accordingly, they should be classed as admissions rather than confessions. The introduction of these statements was not prejudicial to defendant.

3. Defendant points to numerous instances of prosecutorial misconduct, of

which the most serious is the district attorney's repeated references to Lufenberger's testimony as "uncontradicted"; since defendant could not contradict that testimony without taking the stand, those references may constitute an impermissible comment upon defendant's exercise of his right to avoid self-incrimination. Defense counsel, however, did not object to any of these comments. Since the harm could probably have been obviated by timely objection and admonition, we conclude that defendant is barred from raising this issue on appeal.

4. In *People v. Flannel* (1979) 25 Cal.3d 668, 160 Cal.Rptr. 84, 603 P.2d 1, we held that in future cases a defendant is entitled (if the evidence warrants) to a *sua sponte* instruction that an honest but unreasonable belief in the necessity to act in self-defense may rebut malice and reduce a homicide to manslaughter. Since defendant Murtishaw's trial antedated the finality of *Flannel*, the trial court did not err in failing to instruct *sua sponte* on the doctrine of unreasonable self-defense.

5. The trial court, instructing the jury on the charge of assault with intent to commit murder, failed to explain to them that this crime requires express malice, and cannot rest upon theories of implied malice or felony murder. Its failure to so instruct was error (see *People v. Mize* (1889) 80 Cal. 41, 22 P. 80; *People v. Martinez* (1980) 105 Cal.App.3d 938, 165 Cal.Rptr. 11), but since overwhelming evidence demonstrates that defendant acted with express malice, the error is not prejudicial.

6. The trial court denied a defense motion for discovery of prosecution investigations and records relating to the jury panel, or alternatively for funds to hire an investigator to investigate the prospective jurors. Although precedent supports the trial court's order, the manifest unfairness of permitting a secret prosecution investigation of prospective jurors when the defense lacks funds to conduct a similar investigation demonstrates the need to reconsider our position on this issue. In future cases the trial judge should have the discretion to grant the defense access to prosecution jury records and investigations. The value of such an investigation in the present case, however, is so speculative that the trial court's ruling should not form a basis for reversible error.

7. At the penalty phase the prosecution called Dr. Ronald Siegel, a psychopharmacologist, who testified that defendant would probably engage in violent and perhaps homicidal behavior in a prison setting. As we explain, psychological forecasts of future violent behavior are of questionable reliability. Moreover, such evidence, while only marginally relevant to the penalty jury's task under former Penal Code section 190.3,[1] is likely to prove highly prejudicial. We therefore conclude that the trial court should not have permitted Dr. Siegel to testify as to his opinions concerning defendant's future conduct in prison.

The judgment imposing the death penalty must be reversed because the trial court erred in admitting over timely objection the penalty phase testimony of Dr. Siegel. The judgment of guilt is not affected by prejudicial error and is affirmed.

I. *Statement of Facts.*

On the morning of April 9, 1978, defendant (age 20) and Gregory Lufenberger, defendant's brother-in-law, decided to go shooting in the desert.[2] After acquiring two .22 rifles and purchasing cartridges and beer, they drove to the Town of Mojave. Leaving Mojave, after buying more beer, they drove down a dirt road in the desert. Defendant stalled the car and, apparently because of a defective starter, was unable to restart it. They remained by the car;

1. The present case arises under the 1977 death penalty law (Stats.1977, ch. 316), repealed by initiative on November 7, 1978. Citations to former Penal Code sections in this opinion refer to the 1977 law.

2. The account of the events of April 9 is based upon the testimony at trial, including the recorded statement of defendant to the Kern County Sheriff's Department. We will note those relatively few instances in which the testimony is in conflict.

defendant set up a beer can on the car, shot at it, and then fired several shots at the car itself.

In the early afternoon defendant and Lufenberger encountered four college students—Lance Bufflo, Martha Soto (Bufflo's wife), James Henderson, and Ingrid Etayo—who had parked their car, a white Chevrolet, about two-tenths of a mile from defendant's vehicle. The students were filming a movie for Bufflo's cinema class at the University of Southern California. The plot involved a man (played by Henderson) stranded in the desert by car failure. He grows progressively weaker and is finally confronted by a hooded female figure (Etayo) symbolizing impending death. He shoots at the figure, using a .38 revolver and blank cartridges, but is unable to harm it, and succumbs to his fate.

Defendant and Lufenberger asked the students for a ride to a gas station to arrange car repairs; the students agreed to do so when they had finished filming. Defendant and Lufenberger then returned to their car and again attempted unsuccessfully to start it. During this period, according to Lufenberger, defendant "kept on saying, let's shoot the people, or something like that. He wanted to steal the car or something." Defendant in his interview with the sheriff's office denied making any such statement.

Later in the afternoon defendant and Lufenberger encountered the two women students driving by in the Chevrolet. They asked the women for a ride into town, but the women replied that they were not going to town, but only to pick up some lunch. Defendant and Lufenberger then returned to the site of the filming. Bufflo went over to talk to them, examined and test-fired defendant's rifle, and showed them his rented .38 revolver, which he loaded with blanks. Defendant watched him load the gun, but it is not clear whether he knew the cartridges were blanks. Defendant and Lufenberger again returned to their car; according to Lufenberger defendant again suggested shooting the students.

[1] Defendant and Lufenberger had been drinking beer steadily throughout the day, and had consumed from two to three six-packs of beer. Bufflo and Lufenberger both described defendant as smelling of alcohol, but said that they observed no slurring of speech, unsteadiness, or other physical symptoms of extreme intoxication.[3]

About 5 p. m., the shadows grew too long for filming. After completing the scene in which Henderson futilely shoots at the hooded figure, the students prepared to leave. Defendant followed the students back toward their car. As the students reached the car defendant, then about 80 feet away from the car, began to shoot at them.

According to Bufflo, Henderson, who was carrying the revolver in a satchel, and Etayo reached the car first and went to the passenger side. As Bufflo and Soto walked to the driver's side, Bufflo heard two or three shots. Henderson yelled out "I've been shot. Get me to a hospital." Bufflo then heard five or six more shots strike the car. Bufflo, Henderson (who had been wounded in the shoulder) and Etayo took refuge behind the passenger side of the car.

Bufflo looked under the car and saw Soto lying on the ground. He and Henderson dragged her over to the passenger side. Soto had been shot in the head, an injury which caused her death two days later. After the pause in the firing during which the students attempted to help Soto, more shots struck the car. Etayo shouted that whoever was shooting should stop because people were wounded. Henderson said they would all be killed unless someone went for help; he dashed out from behind the car and was struck and killed by five or six bullets.

3. Defendant revealed to the psychological experts who examined him that he regularly used PCP and marijuana, and occasionally used other drugs as well. Those statements are admissible, however, only to serve as the basis for expert opinion. (*In re Spencer* (1965) 63 Cal.2d 400, 412, 46 Cal.Rptr. 753, 406 P.2d 33.) There is no evidence admitted for the truth thereof to show defendant was under the influence of any drug except alcohol.

Bufflo crawled under the car to see who was shooting. He saw defendant standing behind a bush about 50 feet away. Defendant looked at him and fired several shots at him; one struck him in the hand, while the others struck the car.

Bufflo told Etayo they would have to run. He ran along the road about 150 feet, tripped, and fell. Looking back, he saw defendant walking toward the car. Bufflo ran further, turned, looked back, and saw defendant standing over Etayo, who was sitting next to Soto. Defendant yelled something at the women, but Bufflo could only make out the word "car." He resumed running and heard more shots.[4] Bufflo finally reached the highway, flagged down a van, and got a ride into Mojave where he notified the police.

Lufenberger's account of the killing differs in only minor respects from Bufflo's testimony. Lufenberger said that he first heard a few shots, which sounded louder than shots from a .22. Lufenberger walked toward the Chevrolet. He heard a number of shots from the .22, then saw defendant reload his gun and resume shooting. A hooded woman with an arm wound (presumably Etayo) came out from behind the car and walked toward defendant, begging him to stop shooting. Defendant told her to stop or he would shoot her. Lufenberger then ran back toward defendant's car. He heard more shots. Defendant also ran back toward his car. When he caught up with Lufenberger, Lufenburger asked defendant why he had shot the students; defendant replied "I don't know." Lufenberger then asked if defendant intended to kill Lufenberger; defendant said no. At Lufenberger's suggestion they threw their guns in the desert and hitchhiked home.

Defendant's statement to the police presents a third version of the killing. He said he started toward the Chevrolet to get the promised ride into town. He then heard two or three shots. Knowing the students had finished the filming, he did not know what was happening; he felt confused, angry, and thought that the students were shooting at him. He immediately began firing at the car, emptying the entire clip. As he reloaded, he heard Lufenberger shout "throw out your gun." A shirtless man ran away (Bufflo); a hooded figure (Etayo) came at him from the car. He told the figure to stop and, when it did not, shot it. (Defendant did not mention shooting either Soto or Henderson.) After the shooting concluded, according to defendant, Lufenberger suggested that they take the Chevrolet, but defendant observed that fluid was leaking from the car where bullets had struck. He and Lufenberger then agreed to leave their guns in the desert and hitch a ride home.

When the police arrived, Henderson and Etayo were dead. Soto died two days later. All died of bullet wounds from a .22 rifle; ballistics tests indicated all shots came from defendant's gun.

Defendant and Lufenberger hitched a ride to a Denny's Restaurant in Saugus, where they encountered their wives who had been looking for them. As they drove home to Norwalk together, defendant told his wife that their car had been stolen and that he had shot three people. They went to the home of defendant's brother, Gerald Murtishaw, and told him of the killings. With defendant's permission, Gerald called the Norwalk police, who came and arrested defendant about 1 a. m. the morning of April 10.

Kern County Sheriff's Investigators Higgins and Pendleton arrived at the Norwalk police station about 6 a. m. After listening to a statement of his *Miranda* rights, defendant agreed to talk to the investigators; in response to questions he admitted killing the victims. The investigators did not record this interrogation, but Higgins took notes which he used to prepare a typed report, and then destroyed. The investiga-

4. Bufflo's testimony might imply that Etayo was killed beside the car. Both defendant and Lufenberger testified, however, that she came out from behind the car and was walking toward defendant when he shot her. The position of the body described by the police witnesses supports the latter version.

tors then took defendant to Bakersfield. Beginning about 2 p. m., the investigators, accompanied by a deputy district attorney, again interrogated defendant. The district attorney introduced the tape recording of the Bakersfield interview into evidence and supplied the jury with a transcript.

Defendant and Lufenberger were charged with three counts of murder and one of assault with intent to commit murder. Both pled not guilty. Before preliminary hearing, the district attorney dismissed all charges against Lufenberger. Defendant was held to answer on all charges.

The superior court granted defendant's request to enter a plea of not guilty by reason of insanity. It appointed three psychiatrists to examine defendant concerning his sanity at the time of the offense. It also granted the district attorney's motion for appointment of psychopharmacologist Ronald Siegel to examine defendant to determine whether he was under the influence of PCP at the time of the crime.

Shortly before trial, defendant filed a number of motions concerning the jury selection. He first moved for discovery of any prosecution records or investigation of potential jurors, or in the alternative for funds to conduct a comparable defense investigation. He further requested the court either to forbid voir dire of the jurors concerning their views on capital punishment, or alternatively to empanel separate guilt and penalty juries, basing both requests on the theory that juries which exclude persons who would automatically vote against the death penalty are biased against defendant at the guilt phase of the trial (see *Hovey v. Superior Court* (1980) 28 Cal.3d 1, 168 Cal.Rptr. 128, 616 P.2d 1301). The trial court denied all motions, but ordered that voir dire of jurors concerning their views on the death penalty and their knowledge of pretrial publicity be conducted individually in chambers.[5]

At trial, defendant withdrew his plea of not guilty by reason on insanity and relied exclusively on a defense of diminished capacity. The prosecution therefore presented three expert witnesses on the question of defendant's mental state at the time of the offense. The two psychiatrists, Doctors Matychowiak and Burdick, stated that defendant was able to intend to kill, to premeditate, and to deliberate. They relied for their opinions upon his lack of history of mental illness, evidence that he was not severely inebriated, and his fairly accurate chronological recall of events. Both rejected the defense theory that he committed the crimes in a "fugue state," a dissociative condition in which the actor sees himself as a sort of spectator to events he cannot control.

Dr. Siegel, a psychologist expert in drug-induced behavior, testified at length, explaining that in his opinion defendant's conduct was not the result of his past use of PCP and other drugs. Dr. Siegel also opined that defendant was capable of premeditation at the time of the killing.

Thus in essence the three prosecution experts painted a picture of defendant as a man under considerable psychological pressure at home (where he and his wife were living with her ex-husband), who has low tolerance for frustration, and who reacts to frustration by violence without caring about the consequences.

The only defense witness, Dr. Kelly, a psychiatrist, agreed in many respects with the prosecution experts' analysis of defendant's overall mental condition. Dr. Kelly, however, felt that defendant's confused and dream-like description of the killing indicated that defendant at the time was in a "fugue state" in which he experienced a distorted sense of time and felt like he was outside his own body with no control over it. Dr. Kelly stated that while defendant was in this state, he would not be able to form any conscious intent and would be unable to premeditate or deliberate.

5. The trial judge thus anticipated our ruling in *Hovey v. Superior Court*, *supra*, 28 Cal.3d 1, 80, 168 Cal.Rptr. 128, 616 P.2d 1301, that the "portion of the voir dire of each prospective juror which deals with issues which involve death-qualifying the jury should be done individually and in sequestration."

The jury found defendant guilty of the first degree murder of Henderson, Soto and Etayo, and of assault with intent to commit murder upon Buffo.[6] It further found the special circumstance of multiple murder. (Former Pen. Code, § 190.2.)

At the penalty phase, the prosecution called Jerry Rothenberger, defendant's former foreman.[7] Rothenberger testified over objection that about 10 days before the crime, he had told defendant to speed up his work; defendant became angry and said "just get out of here, just get out of here, I'm going to kill you, man, just go away." Rothenberger did not testify that defendant accompanied his verbal threat with any physical act.[7]

The district attorney also recalled Dr. Siegel. He testified over objection that defendant would continue to be a violent and assaultive person in prison, reacting to frustration with physical aggression, and could show the "same types of homicidal tendencies that he has shown in the past."[8]

Following two days of deliberation, the jury returned a verdict of death. Defendant moved for modification of sentence. The court reviewed what it felt were the aggravating factors—the multiple killings of vulnerable victims, the killing of Henderson as he fled, the killing of Etayo as she pled for mercy—and two mitigating factors—defendant's youth and lack of a prior criminal record.[9] Concluding that the aggravating factors outweighed the circumstances in mitigation, the court, making an independent determination that the verdict was supported by the evidence, denied the motion to modify the sentence.

6. The jury also found that defendant had used a firearm in committing each of the charged offenses. (See Pen. Code, § 12022.5.)

7. The defense presented three rebuttal witnesses who questioned Rothenberger's veracity.

8. Defendant called witnesses at the penalty phase who testified to his difficult childhood, his good community reputation for honesty, hard work, and nonviolence, and his relatively good record in county jail awaiting trial.

II. *Substantial evidence supports the verdict finding defendant guilty of first degree murder.*

The trial court instructed the jury that it could find defendant guilty of first degree murder on either of two theories: premeditated murder, or murder committed in the course of committing a felony; namely, an attempted robbery involving a theft of the victim's car. We examine the evidence to support the verdict on both theories.

[2] We observe first that the evidence is ample to support a verdict finding premeditated murder. Three prosecution experts testified that defendant, although intoxicated to some degree, was capable of premeditation and deliberation at the time of the killings. Although defendant argues that proof that he was able to premeditate does not prove that he did so, the testimonial account of the crime and events leading up to it strongly suggests that defendant did in fact premeditate the murders.

In *People v. Anderson* (1968) 70 Cal.2d 15, 27, 73 Cal.Rptr. 550, 447 P.2d 942, we suggested three factors which might lead an appellate court to sustain a finding of premeditated murder: (1) facts showing prior planning activity; (2) facts suggesting motive; (3) facts about the manner of the killing which suggest a preconceived design. The evidence in the present case, viewed in the light most favorable to the prosecution (see *Jackson v. Virginia* (1979) 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560) supports a finding of premeditation under the *Anderson* analysis.

Lufenberger testified that earlier in the day the defendant suggested to Lufenberger that they kill the victims.[10] Shortly

9. We suggest an additional mitigating factor not mentioned by the trial court: that defendant turned himself in to the police before he was a suspect in the case.

10. The public defender stresses that Lufenberger thought defendant was joking and did not take these suggestions seriously. In light of later events, Lufenberger's reaction does not prove the suggestion was frivolous, but suggests that Lufenberger did not understand the seriousness of the defendant's intention.

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[25] The foregoing holding does not require us to reverse the conviction in the present case. As the prior cases have pointed out, in any individual case it *is* entirely speculative whether denial of access caused any significant harm to the defense. Consequently, under the test of prejudice established in the California Constitution (art. VI, § 13) and *People v. Watson, supra,* 46 Cal.2d 818, 836, 299 P.2d 243, the denial of access is not reversible error.

VIII. *The trial court erred in admitting the penalty phase testimony forecasting that defendant would commit violent and possibly homicidal acts in prison.*

[26] The prosecution recalled Dr. Ronald Siegel, a psychopharmacologist, to testify in the penalty trial. He stated over objection that defendant in a prison setting "will continue to be a violent assaultive and combative individual, and in constraints, with restraints on his behavior, and in a custodial care situation such as in a prison or in a jail, because of his inability to relate inter-personally, because of his latent rage and hostility and violence, I believe that this will be manifested in repeated displays. I think these displays, in my opinion, will be physical rather than verbal simply because his history, his past history and my clinical studies of him have indicated, his past history is one of physical rather than verbal displays. And that he may become not only assaultive and violent, but he could show the same types of homicidal tendencies that he has shown in the past, with no ability to morally or physically constrain himself to the demands of the environment in which he finds himself."

[27] We believe that the trial court should not have permitted this testimony. We shall explain that (1) expert predictions that persons will commit future acts of violence are unreliable, and frequently erroneous; (2) forecasts of future violence have little relevance to any of the factors which the jury must consider in determining whether to impose the death penalty; (3) such forecasts, despite their unreliability and doubtful relevance, may be extremely prejudicial to the defendant. The admission of this testimony, in our opinion, constitutes error requiring reversal of the verdict at the penalty trial.[29]

Numerous studies have demonstrated the inaccuracy of attempts to forecast future violent behavior.[30] Two commentators

29. Defendant also argues that the admission of Siegel's testimony violated one of the safeguards established in *In re Spencer* (1965) 63 Cal.2d 400, 46 Cal.Rptr. 753, 406 P.2d 33, to limit the use of psychiatric testimony based on interviews at which defense counsel was not present. We said in *Spencer* that if "a defendant does not specifically place his mental condition into issue at the guilt trial, then the ... psychiatrist should not be permitted to testify at the guilt trial." (P. 412, 46 Cal.Rptr. 753, 406 P.2d 33.) We added in a footnote that if "defendant does not offer evidence of his mental condition at the penalty trial, the ... psychiatrist may not, of course, testify at that trial." (*Id.*, at fn. 10, 46 Cal.Rptr. 753, 406 P.2d 33.)

Defendant here maintains that he did not place his mental condition into issue at the penalty trial and consequently that Siegel should not have been permitted to testify at that trial. Defendant, however, raised an issue of diminished capacity, a defense which relates not only to guilt but also constitutes a mitigating circumstance in determining penalty. (See former Pen.Code, § 190.3, factors (c) and (g).) The parties stipulated that the evidence offered at the guilt phase could be considered by the jury at the penalty trial. Thus defendant did put his mental condition into issue at the penalty phase; the testimony of Siegel at the penalty trial did not violate the *Spencer* guidelines.

30. In *People v. Burnick* (1975) 14 Cal.3d 306, 326–327, footnote 17, 121 Cal.Rptr. 488, 535 P.2d 352, we quoted the description of one study from Ennis, Prisoners of Psychiatry: Mental Patients, Psychiatrists and the Law (1972) page 227: "... In a well-known New York study, psychiatrists predicted that 989 persons were so dangerous that they could not be kept even in civil mental hospitals, but would have to be kept in maximum security hospitals run by the Department of Corrections. Then, because of a United States Supreme Court decision [*Baxstrom v. Herold* (1966) 383 U.S. 107, 86 S.Ct. 760, 15 L.Ed.2d 620], those persons were transferred to civil hospitals. After a year, the Department of Mental Hygiene reported that one-fifth of them had been discharged to the community, and over half had agreed to remain as voluntary patients. During the year, only 7 of the 989 committed or threatened any act that was suffi-

summarized the results as follows: "Whatever may be said for the reliability and validity of psychiatric judgments in general, there is literally no evidence that psychiatrists reliably and accurately can predict dangerous behavior. To the contrary, such predictions are wrong more often than they are right." (Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom* (1974) 62 Cal. L.Rev. 693, 737.)[31] Professor Dershowitz in 1969 pointed to the skewed results characteristic of psychiatric forecasts: "it seems that psychiatrists are particularly prone to one type of error—over-prediction .... [F]or every correct psychiatric prediction of violence, there are numerous erroneous predictions." (Dershowitz, *The Psychiatrist's Power in Civil Commitment: A Knife That Cuts Both Ways* (Feb. 1969) Psych. Today, at p. 47.) Cocozza and Steadman in 1976 reviewed the various studies and reported that "Whether one examines the legal, behavioral science or psychiatric literature on predictions of dangerousness, one constantly encounters conclusions similar to the one reached by Dershowitz that psychiatrists are generally inaccurate predictors." (Cocozza & Steadman, *op. cit., supra*, 29 Rutgers L.Rev. at p. 1085.) In 1978 Professor Monahan undertook a further review of studies of violence prediction and noted that the percentage of false positives (erroneous predictions that a subject would engage in violent behavior) never fell below 54 percentage and went as high as 99.7 percent. (Monahan, The Prediction and Control of Violent Behavior (1978) pp. 179–196, in Hearings Before the House Subcom. on Domestic and International Scientific Planning, 95th Cong., 2d Sess., pp. 175–252.)

We took judicial notice of studies showing the unreliability of attempts to forecast violence in *People v. Burnick, supra*, 14 Cal.3d 306, 121 Cal.Rptr. 488, 535 P.2d 352.[32] We there observed that: "During the past several years further empirical studies have transformed the earlier trend of opinion into an impressive unanimity: 'The evidence, as well as the consensus of opinion by responsible scientific authorities, is now unequivocal.' (Diamond, *The Psychiatric Prediction of Dangerousness* (1975) 123 U.Pa.L.Rev. 439, 451.) In the words of spokesmen for the psychiatric profession itself, 'Unfortunately, this is the state of the art. Neither psychiatrists nor anyone else have reliably demonstrated an ability to predict future violence or "dangerousness." Neither has any special psychiatric "expertise" in this area been established.' (Task Force Report, Clinical Aspects of the Violent Individual (American Psychiatric Assn., 1974) p. 28.) And the same studies which proved the inaccuracy of psychiatric predictions have demonstrated beyond dispute the no less disturbing manner in which such prophecies consistently err: they predict acts of violence which will not in fact take place ('false positives'), thus branding as 'dangerous' many persons who are in reality totally harmless. (See generally *id.* at pp. 23–30.)" P. 327, 121 Cal.Rptr. 488, 535 P.2d 352.)

In *Burnick*, we cited the uncertain character of psychological prediction to support our conclusion that a person should not be committed as a mentally disordered sex of-

dently dangerous to require retransfer to the maximum security hospital. Seven correct predictions out of almost a thousand is not a very impressive record.

"Other studies, and there are many, have reached the same conclusion: psychiatrists simply cannot predict dangerous behavior. They are wrong more often than they are right. And they always err by overpredicting dangerous behavior."

For a thorough review of the numerous studies on this issue, see Cocozza & Steadman, *The Failure of Psychiatric Predictions of Dangerousness: Clear and Convincing Evidence* (1976) 29 Rutgers L.Rev. 1084.

31. The studies usually refer to *psychiatric* predictions of violence; Dr. Siegel is a psychologist. We find no reason to doubt that the conclusions of the studies apply equally to forecasts by psychologists.

32. Because this court has already taken judicial notice of the unreliability of expert forecasts of future violence, we do not believe it necessary to determine whether such forecasts must meet the test established in *People v. Kelly* (1976) 17 Cal.3d 24, 130 Cal.Rptr. 144, 549 P.2d 1240, for the admissibility of scientific evidence.

fender unless found to be such beyond a reasonable doubt. The issue in *Tarasoff v. Regents of University of California* (1976) 17 Cal.3d 425, 131 Cal.Rptr. 14, 551 P.2d 334, was different—whether a psychotherapist who predicted that a patient would kill an identifiable victim owed a duty to exercise reasonable care to avert that danger. Rejecting the contention that a therapist should not act on the basis of predictions of such demonstrated unreliability, we held that when a therapist predicts or should predict a danger of violence, he incurs an obligation to use reasonable care to protect the intended victim.

We explained in *Tarasoff* that imposition of such a duty of care was not inconsistent with our decision in *Burnick*. In contrast to *Burnick* the issue in *Tarasoff*, we said, was "not whether the patient should be incarcerated, but whether the therapist should take any steps at all to protect the threatened victim; some of the alternatives open to the therapist, such as warning the victim, will not result in the drastic consequences of depriving the patient of his liberty. Weighing the uncertain and conjectural character of the alleged damage done the patient by such a warning against the peril to the victim's life, we conclude that professional inaccuracy in predicting violence cannot negate the therapist's duty to protect the threatened victim." (17 Cal.3d at p. 439, 131 Cal.Rptr. 14, 551 P.2d 334.)

Thus in *Tarasoff* we balanced the "uncertain and conjectural" harm to the patient against the mortal risk to the potential victim, and concluded that the therapist should act on the basis of his prediction, unreliable though it may be. That same balancing process in the present context yields a far different result. There is nothing speculative about the harm to defendant, who faces not merely a risk of short-term incarceration but of execution. What is uncertain and conjectural is whether defendant, if imprisoned for life, will at some uncertain future date assault some yet unidentified victim. The calculus of risk which called for acting despite uncertainty in the *Tarasoff* setting does not justify executing a defendant to avoid improbable and speculative danger.

[28] The Attorney General points out that, despite our doubts concerning psychological predictions of future violence, we have never barred the expert witness from testifying to his opinion on that subject. It would be consistent with past cases, he suggests, to hold that difficulties in prediction go to the weight of the evidence rather than to its admissibility.[33]

[29] We reject this suggestion, for two reasons. First, as we recognized earlier, "the penalty of death is qualitatively different from a sentence of imprisonment, however, long.... Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." (*Woodson v.*

33. The Attorney General also argues that the People have a constitutional right to introduce testimony predicting that a defendant will probably commit future criminal acts. He quotes *Jurek v. Texas* (1976) 428 U.S. 262, 275, 96 S.Ct. 2950, 2957-58, 49 L.Ed.2d 929, in which the Supreme Court, upholding a Texas statute that permitted the jury to consider the likelihood of future criminal conduct, said "Indeed, a prediction of future criminal conduct is an essential element in many of the decisions rendered throughout our criminal justice system.... And any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose."

The issue before the Supreme Court in *Jurek* was quite different from that presented in the present case. *Jurek* held a specific state statute requiring the jury to determine the probability of future criminal conduct was constitutional. The California Legislature has enacted no comparable statute. Thus the issue here is the admissibility of an expert forecast of future criminal conduct offered under a statute permitting evidence "relevant to aggravation" (former Pen.Code, § 190.3). Weighing the prejudicial impact of that testimony against its marginal relevance and questionable reliability, we conclude that it should not be admitted. *Jurek* does not demand a contrary conclusion; although that decision implies that state courts could constitutionally admit evidence concerning the likelihood of future criminal acts it does not require state courts to admit all such evidence regardless of its unreliability or prejudicial effect.

North Carolina (1976), 428 U.S. 280, 305, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (plur. opn. of JJ. Stewart, Powell, and Stevens.) Consequently, "[a]lthough the utilization of predictive testimony by mental health experts in death penalty hearings does not differ in many ways from reliance upon it in other contexts, the unique severity of the penalty increases the importance of avoiding unjustified reliance upon predictions of 'dangerousness.'" (Dix, *The Death Penalty, "Dangerousness," Psychiatric Testimony, and Professional Ethics* (1977) 5 Am.J. Crim.L. 151, 212.) In short, evidence which is barely reliable enough to justify a civil judgment or a limited commitment is not reliable enough to utilize in determining whether a man should be executed.[34]

[30] Second, in most of the other cases in which courts have upheld admission of opinion testimony forecasting future violence, such as *People v. Henderson* (1980) 107 Cal.App.3d 475, 484, 166 Cal.Rptr. 20 the trier of fact is required by statute to determine whether a person is "dangerous." (See, e. g., Pen.Code, § 1026.2 (restoration to sanity); Welf. & Inst.Code, §§ 5276, 5300 (Lanterman-Petris-Short Act); Welf. & Inst.Code, § 6300 (mentally disordered sex offender hearings).) In such cases expert prediction, unreliable though it may be, is often the only evidence available to assist the trier of fact. The penalty jury in a murder trial, however, is not required to determine whether the defendant is dangerous or likely to commit future violence; in fact, as we shall explain, such a determination is at best only marginally relevant to the task at hand. Expert forecasts of future violent acts, as we have said, have little relevance to the determination of penalty. The Legislature has listed specifically the factors which the jury must consider in deciding whether to impose the death penalty.[35] The testimony of Dr. Siegel is not relevant to any of the listed factors.[36]

34. Just as the sentence of death is unique, so is the role of the penalty jury. When a jury decides an issue of guilt, an appellate court can reverse that conviction if it rests on evidence which is entitled to little weight—evidence which is not "of ponderable legal significance ... reasonable in nature, credible, and of solid value." (*People v. Johnson* (1980) 26 Cal.3d 557, 576, 162 Cal.Rptr. 431, 606 P.2d 738, quoting *Estate of Teed* (1952) 112 Cal.App.2d 638, 644, 247 P.2d 54.) The penalty jury's verdict, however, does not resolve a question of fact, and it is not clear whether an appellate court can reverse that verdict on the ground that it is unsupported by substantial evidence. Thus the danger arises that a penalty verdict may rest upon evidence entitled to little weight and yet escape appellate scrutiny.

35. The paragraph in question in section 190.3 reads as follows:

"In determining the penalty the trier of fact shall take into account any of the following factors if relevant:

"(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1.

"(b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the expressed or implied threat to use force or violence.

"(c) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

"(d) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

"(e) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.

"(f) Whether or not the defendant acted under extreme duress or under the substantial domination of another person.

"(g) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or the affects of intoxication.

"(h) The age of the defendant at the time of the crime.

"(i) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

"(j) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime."

36. None of the factors explicitly encompass predictions of future violence. The Attorney General argues that proof of a pattern of violent conduct by defendant might be admissible under factor (b), which permits a showing of past criminal activity involving force or the threat of force, or to rebut defendant's claim

Former section 190.3, however, permitted the parties to introduce evidence "as to any matter relevant to aggravation, mitigation, and sentence, including, but not limited to, the nature and circumstances of the present offense, the presence or absence of other criminal activity by the defendant which involved the use or attempted use of force or violence or which involved the expressed or implied threat to use force or violence, and the defendant's character, background, history, mental condition and physical condition." The admission of evidence is not limited to matters relevant to the specified aggravating or mitigating factors.[37]

Arguably the risk that defendant will commit future violent acts is a matter "relevant to aggravation" which reflects on defendant's future "character" and "mental condition." In view of the unreliability of that forecast, however, the probative value of that testimony is far outweighed by its prejudicial impact.[38] One can imagine few matters more prejudicial at the penalty trial than testimony from an established and credentialed expert that defendant, if sentenced to life without possibility of parole, would be likely to kill again. Such testimony implants in the mind of each juror the message that the death penalty, promptly carried into effect, is the only way to protect society from the defendant—the only way to forestall another instance in which defendant responds to frustration with deadly violence. "A trier of fact offered the opportunity to base a decision on the affirmative assertion by an apparently well-qualified professional that a defendant's execution is essential to saving the lives of others is likely to take that opportunity rather than face the difficult task of evaluating the offender's ethical culpability.... [Such predictions tend] to discourage the sort of individualization that the Supreme Court has demanded of death penalty procedures." (Dix, *Participation by Mental Health Professionals in Capital Murders Sentencing* (1978) 1 Internat. J. of L. & Psych. 283, 397.)

We acknowledge that despite the recognized general unreliability of psychiatric predictions concerning future violence, it may be possible for a party in a particular case to show that a reliable prediction is possible. A more reliable forecast, for example, might be possible if the psychiatrist had established a close, long-term relationship with defendant that gives him a greater understanding of defendant's behavior than can usually be attained in brief, often adversary, pretrial interviews. A reliable prediction might also be conceivable if the defendant had exhibited a long-continued pattern of criminal violence such that any knowledgeable psychiatrist would anticipate future violence. Thus we do not adopt an absolute rule barring such predictions at the penalty phase of a capital trial.[39]

In the present case, however, Siegel examined defendant on only one occasion—an examination devoted largely to determining whether defendant acted under the influence of PCP or other drugs—and had no established and close relationship with defendant on which to base his prediction. Defendant's asserted past violent acts were few and relatively trivial. Under these cir-

that he acted under the influence of mental or emotional disturbance (factor (c)), or that his capacity was diminished by intoxication (factor (g)). The actual prediction that defendant would probably be violent in prison, however, is not strictly relevant to either past violent conduct (factor (b)) or to defendant's state of mind at the time of the killing (factors (c) and (g)).

37. We note, but need not resolve, the constitutional problems which might arise if it appeared that a verdict of death rested, not on an implicit determination that aggravating factors outweighed mitigating factors, but on evidence of defendant's background, history, or character irrelevant to any of the listed factors.

38. Cf. Evidence Code section 352, which provides that "[t]he court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will ... create substantial danger of undue prejudice...."

39. Our decision does not, of course, preclude the use of psychiatric testimony at the penalty phase to show defendant's present "character, background, history, mental condition and physical condition" (former Pen.Code, § 190.3).

cumstances we have no reason to believe that Siegel's prediction was immune from the general unreliability which attends predictions of future violence generally.

In sum, Siegel's prediction that defendant would be violent in a prison setting is unreliable. In fact, judging by the studies cited, that prediction is probably wrong; in other words, despite Siegel's forecast, it is statistically more probable that defendant will not commit such violent acts. The prediction is not directly relevant to any of the factors which the jury was required to consider in fixing the penalty under former section 190.3, and, although arguably admissible under that statute, the prejudicial impact of that testimony far outweighs its probative value. We conclude that the trial court should not have permitted Siegel to testify over objection as to his opinion respecting defendant's future behavior.[48]

[31] The erroneous admission of Siegel's testimony, is prejudicial error under any standard of review. Siegel's prediction that defendant would be violent and homicidal in prison was the principal prosecution penalty phase evidence. The jury deliberated two full days before deciding on the death penalty, suggesting that the issue of penalty was close. Under these circumstances, even if we applied the most liberal test of prejudicial error—whether it is reasonably probable that a more favorable result would have been reached absent the error (see *People v. Watson*, *supra*, 46 Cal.2d 818, 836, 299 P.2d 243)—we would conclude that the admission of Siegel's testimony was reversible error.

The judgment is reversed insofar as it relates to penalty. In all other respects the judgment is affirmed.

BIRD, C. J., and MOSK, NEWMAN, REYNOSO * and GRODIN,* JJ., concur.

RICHARDSON, Justice, concurring and dissenting.

I concur in the majority opinion to the extent that it affirms defendant's conviction of first degree murder. I respectfully dissent, however, from a reversal of the judgment as to penalty. In my view, the trial court did not err in admitting expert testimony regarding defendant's propensity for violent conduct.

Dr. Ronald Siegel is a psychologist licensed to practice in this state. He had worked for seven years as a research psychologist in Terminal Island, a federal prison, as well as in the jail systems in Los Angeles and Orange County, studying the effects of incarceration upon prisoners or inmates (primarily drug offenders). Based upon his extensive studies, his review of psychiatric and psychological reports con-

48. Two earlier decisions involving the same defendant (*People v. Hines* (1967) 66 Cal.2d 348, 355, 57 Cal.Rptr. 757, 425 P.2d 557; *People v. Hines* (1964) 61 Cal.2d 164, 173, 37 Cal.Rptr. 622, 390 P.2d 398) upheld admission of psychiatric testimony that defendant might kill again. These decisions antedate most of the studies cited herein to show the unreliability of psychiatric forecasts, as well as our recognition of such unreliability in *People v. Burnick*, *supra*, 14 Cal.3d 306, 121 Cal.Rptr. 488, 535 P.2d 352. The date from a past era when no standards governed the discretion of the penalty jury (see *In re Anderson* (1968) 69 Cal.2d 613, 73 Cal.Rptr. 21, 447 P.2d 117) and in which the courts accordingly imposed few constraints on the admissibility of penalty phase evidence (see *People v. Jones* (1960) 52 Cal.2d 636, 647, 343 P.2d 577.) Consequently, the view of the penalty determination expressed in the *Hines* decisions is no longer viable, and, to the extent that language in those cases is inconsistent with the present opinion, it is expressly disapproved.

The other decisions cited by the dissent are not on point. The psychiatric testimony in *People v. Bickley* (1962) 57 Cal.2d 788, 793, 22 Cal.Rptr. 340, 372 P.2d 100, could be construed as describing Bickley's present mental condition rather than forecasting future behavior. *Addington v. Texas* (1979) 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323; *Brown v. Colm* (1974) 11 Cal.3d 639, 114 Cal.Rptr. 128, 522 P.2d 688, and *People v. Henderson*, *supra*, 107 Cal.App.3d 475, 166 Cal.Rptr. 20 are not capital cases. The dissent's reliance upon such cases suggests that the dissent rejects the basic proposition that greater reliability is required for determinations of life and death than is required in civil commitment proceedings such as *Addington v. Texas* or tort actions such as *Brown v. Colm*.

* Assigned by the Chairperson of the Judicial Council.

cerning defendant herein, and his own personal examination of defendant, Dr. Siegel stated as his opinion at the penalty trial that defendant will continue to be "a violent assaultive and combative individual" in prison by reason of his "inability to relate inter-personally, because of his latent rage and hostility and violence." Dr. Siegel further testified that he believed defendant would express his rage physically, based upon defendant's past history of "physical rather than verbal displays," and that defendant "may become not only assaultive and violent, but he could show the same types of homicidal tendencies that he has shown in the past, with no ability to morally or physically constrain himself to the demands of the environment in which he finds himself."

Defense counsel cross-examined Dr. Siegel, eliciting from him aspects of his limited experience with conditions in state prisons. Counsel also called Clinton Duffy, former warden of San Quentin Prison, to testify regarding the available counseling and therapy at state prisons, and to give Duffy's own opinion that prisoners convicted of first degree murder and sentenced to life imprisonment are "more reliable, they're the best prisoners.... They don't get in too much trouble, if any."

The majority reverses the penalty of death in this case *solely* on the ground that Dr. Siegel's testimony was inadmissible. The majority states that expert predictions of future violence have "doubtful relevance" to the penalty issue, are "unreliable, and frequently erroneous," and "may be extremely prejudicial to the defendant." (*Ante*, p. 758 of 175 Cal.Rptr., p. 466 of 631 P.2d.) To the contrary, as I explain herein, the probable dangerousness of the defendant is one of the more relevant factors to be considered by the jury in deciding the penalty issue and is clearly admissible under former Penal Code section 190.3. Moreover, the possible unreliability of an expert's testimony is uniformly held insufficient to justify exclusion of that testimony, as such an objection goes to its weight rather than its admissibility. Finally, any "prejudicial" effects from introduction of this evidence can be minimized by probing cross-examination, impeachment and opposing testimony.

1. *Relevance*

Former section 190.3 of the Penal Code expressly permits either the People or the defendant, during the penalty phase, to present evidence "as to *any matter relevant to aggravation*, mitigation, and sentence, including, but not limited to, the nature and circumstances of the present offense, the presence or absence of other criminal activity by the defendant which involved the use or attempted use of force or violence or which involved the expressed or implied threat to use force or violence, *and the defendant's character*, background, history, *mental condition* and physical condition." (Italics added.) The section also lists a number of additional factors to be considered by the trier of fact, none of which directly pertains to the defendant's character or propensity for violence. (See former § 190.3, subds. (a)–(j).) Although the majority observes that "The testimony of Dr. Siegel is not relevant to any of the listed factors" in subdivisions (a) through (j), the majority is forced to concede that "Arguably the risk that defendant will commit future violent acts is a matter 'relevant to aggravation' which reflects on defendant's future 'character' and 'mental condition.'" (*Ante*, at p. 762 of 175 Cal.Rptr., p. 470 of 631 P.2d.) Thus, the majority's own analysis belies its earlier suggestion (p. 758 of 175 Cal.Rptr., p. 466 of 631 P.2d) that the defendant's propensity for violence is a factor of "doubtful relevance" to the penalty issue.

Indeed, this very factor, defendant's propensity for violence, is one of only three factors given primary consideration by the jury under the Texas death penalty law upheld by the United States Supreme Court in *Jurek v. Texas* (1976) 428 U.S. 262, 269–277, 96 S.Ct. 2950, 2955–59, 49 L.Ed.2d 929. In Texas, the jury at the penalty trial is asked to determine "whether ... there was a probability that the defendant would commit criminal acts of violence that would

constitute a continuing threat to society." (*Id.*, at pp. 267–268, 96 S.Ct. at 2954.) As I discuss in the next part of this dissent, the high court upheld the constitutionality of the Texas statute, expressly rejecting the contention, so readily accepted by the majority here, that it is "impossible to predict future behavior...." (*Id.*, at p. 274, 96 S.Ct. at 2957.)

The relevance of the defendant's propensity for future acts of violence seems plain, although the majority professes difficulty discerning it: If the defendant is likely to continue in his violent course, endangering the lives of those around him (including guards and other prisoners), a reasonable juror might well conclude that defendant's behavioral pattern is a factor "relevant to aggravation" under former section 190.3. In the words of the United States Supreme Court, "consideration of *the character* and record of the individual offender" is an indispensable part of the death penalty determination process. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 304, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944, italics added.)

2. *Reliability*

Relying primarily upon technical studies and surveys by persons whose own reliability is wholly beyond our expertise to measure, the majority concludes that "expert predictions that persons will commit future acts of violence are unreliable, and frequently erroneous." (*Ante*, p. 758 of 175 Cal.Rptr., p. 466 of 631 P.2d; pp. 758–759 of 175 Cal.Rptr., pp. 466–467 of 631 P.2d.) Although this premise may be supported by the majority's cited sources, it certainly does not lead to the conclusion that such unreliability renders *inadmissible* expert testimony on the subject. Indeed, prior to today's decision, the cases uniformly have held that such an opinion is admissible, subject to the usual methods of impeachment through cross-examination and introduction of contrary expert opinion.

Thus, it is well established that expert testimony regarding the defendant's probable dangerousness or potential for future violence is admissible whenever such condition is relevant to the issues. (*People v. Hines* (1967) 66 Cal.2d 348, 355, 57 Cal.Rptr. 757, 425 P.2d 557; *People v. Hines* (1964) 61 Cal.2d 164, 173, 37 Cal.Rptr. 622, 390 P.2d 398; *People v. Bickley* (1962) 57 Cal.2d 788, 793, 22 Cal.Rptr. 340, 372 P.2d 100; *People v. Henderson* (1980) 107 Cal.App.3d 475, 484, 166 Cal.Rptr. 20.) As noted above, evidence of "defendant's character ... and mental condition" is expressly admissible under Penal Code section 190.3.

The majority evidently would disapprove the foregoing cases, based upon its doubts as to the reliability of expert predictions as to future dangerousness. Rather than impose an absolute rule in this regard, however, the majority leaves open the possibility that such predictions might be admissible in a given case if founded upon a "close, long-term relationship" with the defendant and a "greater understanding of defendant's behavior," or upon a "long continued pattern of criminal violence." (*Ante*, p. 762 of 175 Cal.Rptr., p. 470 of 631 P.2d.) Unfortunately, these purported standards of admissibility are so broad and vague as to afford little or no guidance to trial courts which must attempt to apply them in future cases.

In *Tarasoff v. Regents of University of California* (1976) 17 Cal.3d 425, 438, 131 Cal.Rptr. 14, 551 P.2d 334, the majority of this court observed that, although expert predictions of violence are difficult to make and are often erroneous, "the judgment of the therapist in diagnosing emotional disorders and in predicting whether a patient presents a serious danger of violence *is comparable to the judgment which doctors and professionals must regularly render under accepted rules of responsibility.*" (Italics added.) A similar analysis led the United States Supreme Court in *Jurek v. Texas*, supra, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929, to uphold the Texas death penalty law which places great emphasis upon the question whether it was probable that the defendant would commit further criminal acts of violence. In rejecting the defendant's contention that "it is impossible to predict future behavior," the high court

stated: "It is, of course, not easy to predict future behavior. *The fact that such a determination is difficult, however, does not mean that it cannot be made.* Indeed, prediction of future criminal conduct is an essential element in many of the decisions rendered throughout our criminal justice system.... [A]ny sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose." (Pp. 274–275, 96 S.Ct. at 2957–58, italics added, fn. omitted.)

The Supreme Court also recently explained that "Whether the individual is mentally ill *and dangerous to either himself or others* ... turns on the *meaning* [italics in original] of the facts which must be interpreted *by expert psychiatrists or psychologists.*" (*Addington v. Texas* (1979) 441 U.S. 418, 429, 99 S.Ct. 1804, 1811, 60 L.Ed.2d 323, italics added.)

Thus, the fact that predictions of dangerousness may be difficult to make certainly does not render them inadmissible, especially when those predictions are made by persons statutorily qualified to make them. (See Bus. & Prof. Code, § 2903.) As we recently stated, "The unmistakable general trend in recent years has been toward *liberalizing* the rules relating to the testimonial qualifications of medical experts.... [¶] There are sound and persuasive reasons supporting this trend toward permitting admissibility more readily, rather than rigidly compelling rejection of expert testimony. It is obvious that an overly strict standard of qualification would make it difficult and in some instances virtually impossible to secure a qualified expert witness." (*Brown v. Colm* (1974) 11 Cal.3d 639, 645–646, 114 Cal.Rptr. 128, 522 P.2d 688, italics added.) Thus, the cases acknowledge that "every medical opinion, of necessity, must be in a sense speculative; but this does not destroy the probative value of such opinion [citation]. In essence, appellant's objection here goes to the weight, rather than the admissibility of the evidence; ..." (*Schnear v. Boldrey* (1971) 22 Cal.App.3d 478, 484, 99 Cal.Rptr. 404.)

The majority's fear that expert testimony regarding the defendant's dangerousness will have a critical "prejudicial impact" upon the jury is unfounded. We ourselves answered the majority thesis pointing out in *Brown*, supra, that any expert witness "is subject to as penetrating a cross-examination as the ingenuity and intellect of opposing counsel can devise. This inquiry may challenge not only the knowledge of the witness on the specific subject at issue, but also the reasons for his opinion and his evaluation of any written material upon which he relied in preparation for his testimony. (Evid.Code, § 721.) Further, a defendant is free to argue that the witness' testimony is not entitled to acceptance or credibility because he lacks personal acquaintance with the subject at the time the alleged negligent act occurred, and defendant may produce his own witnesses in rebuttal. *These measures are more than adequate to protect a defendant's interests.*" (*Brown v. Colm*, supra, 11 Cal.3d at P. 646, 114 Cal.Rptr. 128, 522 P.2d 688, italics added.)

There is no indication that in the present case defense counsel was in any way hampered in his attempts to impeach or lessen the credibility of Dr. Siegel's testimony.

For all the foregoing reasons, I conclude that Dr. Siegel's testimony was admissible at defendant's penalty trial. Accordingly, I would affirm the judgment in its entirety.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LARRY WAYNE WHITE, Petitioner	§	
V.	§	CIVIL ACTION NO. H-81-1661
W. J. ESTELLE, JR., DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, Respondent	§	

RESPONDENT'S MOTION FOR NEW TRIAL

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES W. J. Estelle, Jr., Director, Texas Department of Corrections, Respondent herein, by and through his attorney, the Attorney General of Texas, and pursuant to Rule 59, F.R.C.P., files this his Motion for New Trial, and in support thereof would show the Court the following:

I.

On December 30, 1982, this Court entered an order granting the writ of habeas corpus and setting aside the death sentence rendered in the above referenced cause.

II.

Respondent now moves this Court to grant him a new trial because the opinion of this Court is in conflict with a decision rendered on November 12, 1982, by another federal district court in Barefoot v. Estelle, No. W-81-CA-191, Western District of Texas, Waco Division (Exhibit A), currently on appeal.

EXHIBIT "4"

III.

In addition, Respondent renews his objections to the Court's consideration of Petitioner's complaint concerning the use of hypothetical questions for the prediction of future dangerousness, and the use of psychiatric testimony for the prediction of future dangerousness, as both are wholly unexhausted grounds. Respondent properly raised these objections at the evidentiary hearing in this cause, in urging that the issues were not properly raised, and in his post-trial brief.

WHEREFORE, PREMISES CONSIDERED, Respondent respectfully requests that his motion for new trial be granted.

Respectfully submitted,

OF COUNSEL:

JIM MATTOX
Attorney General of Texas

GILBERT J. PENA
Assistant Attorney General
Chief, Enforcement Division

Leslie A. Benitez

LESLIE A. BENITEZ
Assistant Attorney General

P. O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3281

ATTORNEY FOR RESPONDENT

NOTICE OF SUBMISSION

TO: Mr. Edmund Larry Cantu, attorney for Petitioner in the above styled and numbered cause, you are hereby notified that the undersigned attorney for Respondent will bring the above Motion before the Court on the 24th day of January, 1983, or as soon as the business of the Court permits.

Leslie A. Benitez

LESLIE A. BENITEZ
Assistant Attorney General

CERTIFICATE OF SERVICE

I, Leslie A. Benitez, Assistant Attorney General of Texas, do hereby certify that a true and correct copy of the above and foregoing Respondent's Motion for New Trial has been served by placing same in the United States mail, postage prepaid, certified, return receipt requested, on this the 7th day of January, 1983, addressed to: Mr. Edmund Larry Cantu, 2202 Saxon, Houston, Texas 77018.

Leslie A. Benitez

LESLIE A. BENITEZ
Assistant Attorney General

The Attorney General of Texas

M MATTOX
torney General

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Equal Opportunity/
irmative Action Employer

January 7, 1983

Hon. Jesse E. Clark, Clerk
United States District Court
Southern District of Texas
Houston Division
515 Rusk
Houston, Texas 77002

Re: Larry Wayne White v. Estelle,
No. H-81-1661

Dear Sir:

Enclosed please find the original of Respondent's Motion for New Trial to be filed among the papers of the above styled and referenced cause. Also enclosed for the convenience of the Court is a proposed Order.

By copy of this letter, I am forwarding a copy of this instrument to Petitioner's attorney.

Thank you for your kind assistance in this matter.

Sincerely,

Leslie A. Benitez

LESLIE A. BENITEZ
Assistant Attorney General
Austin, Texas

LAB:br
Encls.

cc: Mr. Edmund Larry Cantu
2202 Saxon
Houston, Texas 77018

NO. A-638

RECEIVED
11:33a.m.
JAN 21 1983
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

THOMAS A. BAREFOOT,

Petitioner

V.

W. J. ESTELLE, JR., DIRECTOR

TEXAS DEPARTMENT OF CORRECTIONS,

Respondent

On Petitioner's Motion for Stay of Execution

PETITIONER'S SUPPLEMENTAL MOTION FOR STAY OF EXECUTION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

Petitioner, Thomas A. Barefoot, files this Supplemental Motion for Stay of Execution, which is presently scheduled for sometime before sunrise on January 25, 1983.

I

NATURE OF THE CASE

The nature of the case is detailed in both Petitioner's original Motion for Stay of Execution and Respondent's Response to the Motion already on file with the Court.

II

PROCEDURAL HISTORY OF THE CASE

The procedural history of the case is also detailed in both of the above instruments.

III

STATEMENT OF FACTS

A. MARY RICHARDS' TRIAL AND DEPOSITION TESTIMONY.

The Court of Appeals summarily dismissed Mary Richards' sworn statement, made to petitioner's lawyers and transcribed by a court reporter on December 27, 1982, based upon the following analysis [Opinion, p-13-14]:

1. No rational prosecutor would have called Richards as a witness if she had told him what she now says she did.

2. Her testimony was not important, to begin with.

3. Her testimony of hearing two shots raised an inconsistency because the other evidence, including that of an eye witness to the shooting, was that only one shot was fired.

4. With the strong identification of Barefoot by the other witnesses, to place Mary Richards on the stand if she thought she had seen a different man, would have only contributed another inconsistency.

5. No attorney would have thought she could survive non-leading direct testimony and the cross-examination with only "yes" or "no."

6. If she had told "everybody" and the investigator for the defense of her description of the man she saw, as she now says she did, that would have been played to the hilt by the defense.

7. Petitioner's presence at the scene was clearly established. [emphasis added].

The respondent argues, page 4 of his Response to the Motion for Stay of Execution by this Court, that the Court of Appeals correctly reasoned that the prior opinions by the Court, cited by the dissenters in Brooks v. Estelle, --- U.S.. --- (51 U.S. L.W. 3469 (December 6, 1982), "stand for the proposition that Petitioner is entitled only to a careful, reasoned disposition of the merits of his claims, after opportunity to brief those claims. The opinion of the Court of Appeals below reflects precisely such careful consideration, albeit in the procedural context of a motion to stay execution."

Not so. Petitioner was notified by telephone on the afternoon of January 17, 1983, that the Court of Appeals had set this cause for argument at 9:00 a.m., on January 19, 1983. Letter notification of this setting was received by petitioner's lawyers on January 20, 1983 -- after the Court had already denied his Motion for Stay of Execution. Petitioner has not yet had an adequate opportunity to brief his claims.

The right to an appeal, where the habeas court has issued a certificate of probable cause, cannot be lightly dismissed with the assertion his claims were considered in the "procedural context of a Motion to Stay Execution."

A Motion to Stay Execution, even under an expansive reading of Brooks, cannot and should not stand for the proposition that a petitioner's is "entitled only to a careful, reasoned

disposition of the merits of his claims" under the truncated procedure applied to such proceeding. There can be no "careful, reasoned disposition of the merits" where petitioner is allowed less than 36 hours to file a brief based upon (1) newly discovered evidence involving both prosecutorial misconduct and suppression of evidence, (2) evidence requiring an analysis and briefing of a trial record encompassing 1600 pages; (3) although the Court reporter furnished a copy of the habeas evidentiary proceedings to the respondent on January 14, 1983, he has never furnished a copy of this matter to the indigent petitioner; (4) petitioner received an illegible copy of the habeas proceedings, furnished by respondent's counsel, on the morning of January, 21, 1983; (5) because of the absence of the habeas record the petitioner was unable to respond to the out-of-context statements and misstatements of the evidence made by respondent both in oral argument and in his response before the Court of Appeals, and had to rely solely upon his lawyer's recollection of that testimony and evidence.

Any in-depth evaluation of Richards' present testimony, not as it relates to "a careful, reasoned disposition of the merits of his claims," but as to whether it constitutes the showing of a "substantial" question as required by Brooks, supra, and O'Bryan v. Estelle, --- F.2d --- , slip opinion 638, requires a detailed evaluation of the other trial testimony. An examination of the record clearly reveals that the Court of Appeals either decided the appeal on the merits, without a detailed examination of the trial record, or applied a more stringent test than that required by Brooks and O'Bryan.

The critical impact that Mary Richard's testimony may have had upon the jury must be judged from the effect that her false testimony had upon the State's identification of the "killer."

Five essentially "unbiased" identification witnesses testified at the trial. Their testimony is essential to a determination of the substantiality of the question raised by Richard's tentative in-court identification of Barefoot, where her truthful testimony would have been "that is not the man I saw run down Valley Road from Amy after the shots were fired. Barefoot is not the man."

The jury heard from an accomplice witness and one other impartial witness. An outline of the identification testimony crystalized the issues.

1. JOHN EDWARDS (Direct, R. 1158-1202; 1213-12181. Cross R. 1203-1213.

   a. DIRECT: Edwards, a Ft. Hood soldier made a positive in-court identification of Barefoot as the man he saw near the scene of the fire at the Silver Spur and who ran from the fire, across highway 190, towards Amy.

   b. CROSS: Edwards admitted he had talked with defense counsel only in the office of and in the presence of the District Attorney. He refused to discuss the case with them otherwise. Any prior statements were unavailable to the defense until completion of direct examination.

   Edwards was impeached on cross-examination by a prior inconsistent statement given to law enforcement authorities August 7, 1978, (R.1206, 1207) hours

after the shooting, describing the "man at the fire" as:

1. Tall, 6 foot to 6'2"
2. Short, military haircut
3. Clean Shaven(1207)
4. Medium to slender body build

In the August 7, 1978 statement, Edwards stated, "I don't know if I'd recognize the man again." Further, he conceeded that shortly after the shooting, he saw Barefoot on television, and in newspaper photographs (R. 1208) Edwards was shown a photograph of Barefoot on October 24, 1978, shortly before the trial began (R 1215). In spite of these glaring inconsistencies, Edwards "positively" identified Barefoot in the Courtroom, placing him near the scene of the fire, running toward the area where the shooting occurred.

2. MICHAEL THRASH:

a. DIRECT: Thrash, another soldier stationed at Ft. Hood lived in a trailer park on Amy Lane and was walking toward Highway 190 to catch a ride to the post around five in the morning. Thrash saw the shooting. Although apparently half a block away when the fatal shot was fired, and even with the policecar spotlight hitting the "killer" in the face, he was unable to make an in-court identification of Barefoot as the killer although he gave a description of the man. Thrash was impeached on cross examination when questioned about the discrepancies between his in court description of the killer, and the description given to the police just hours after the shooting:

b. Impeachment of identification testimony:

1) IN COURT: DIRECT

a) Height 5'6" -6'

b) Weight 160-185 lbs.

c) Blue jeans, t-shirt

2. CROSS(prior statement, at R 1255)

a) Tall, 6 foot

b) Military haircut, short enought to see ears.

c) Big, 185-190 lbs

d) Didn't know color of T-shirt

Thrash ran after the killer down Valley road, and after going about half way, stopped and turned back to see if he could help the wounded officer. He saw another man standing in a front yard (1255).

3. CONSUELO MATAMOROS:

DIRECT: Mrs. Matamoros lived at 104 Valley Road and after hearing her dogs bark, looked out the back of her house and saw a man run in her back yard. He stopped and waited while the police car went by. He had rusty colored hair. She heard no gunshots. She could not identify the man.

Cross examination: Her testimony was basically the same. No identification of Barefoot was made and no physical description of the running man in her back yard other than he had rusty colored hair.

4. MARY RICHARDS: (Trial testimony)

DIRECT: Mrs. Richards lived at 111 Valley Road across from Mrs. Matamoros, between Amy Road and Ann. Awake at 5 to 5:30 that morning, she heard a shot. Her bed was against a window facing Valley Road. When she said she heard a second shot, the prosecutor cut her off (R 1263) changing the subject. She saw a man running from Amy down Valley Road, passing right in front of her just three car widths away. She saw him clearly, from the side,

under the street light.

In Court: Direct and Cross

a) The man was about 5'6" tall

b) Smooth face

c) Wearing white T-shirt, neat and clean

d) Grey pants

e) Hair longer in back than front, like it had been styled once, but I couldn't see his ears...DEFINITELY NOT A MILITARY HAIRCUT.

d) Barefoot "resembles" the man running when the shots were fired.

Mary Richards placed Barefoot at the scene of the shooting, by description, and tentative in-court identification. The only other witness to the shooting, Michael Thrash could not identify Barefoot in court, but could give a physical description of the "killer". Thrash's description of the killer given hours after he witnessed the shooting, was not consistent with the man described by Mary Richards in trial. It is, however, the same man described in Mary Richard's deposition.

4. JOHN HERNANDEZ: Direct and Cross

Hernandez, met Barefoot for the first time on the streets of Kileen between 9 and 10 a.m. on August 7, 1982, about three and a half to four hours after the shooting. After spending the whole day and night with Barefoot and seeing him off on a bus to Houston, Hernandez called the police. Barefoot had told him that the police were looking for him [Barefoot] for a killing "I didn't do"(R).

Hernandez described Barefoot for the police:

1. Barefoot had a moustache 4 hours after the shooting. He was not clean shaven until the following day.

2. Barefoot had medium length brown hair, not red, not a military haircut; not styled hair.

3. Barefoot was about 5'6" tall, not 6 feet tall.

4. Barefoot was wearing jeans and a brown t-shirt.

5. Barefoot weighed between 135-140 lbs, not a big built man weighing 180-190 lbs.

6. Barefoot did not have a gun. Hernandez, an admitted homosexual, testified that he made advances toward Barefoot that were refused, but that he got close enough to know there could not have been a gun in his pocket.

Edwards, Thrash, and Richards all made a big point in their description of the killers hair. Not one mentioned the blue denim cap with the GMC logo on it Barefoot was wearing when Roberson (R 1570) allegedly dropped him off at the Seven-eleven, and that that he was wearing when he allegedly returned to the trailer splattered with blood. Two "biased" witnesses testified against Barefoot. Robert Roberson, an accomplice as a matter of law as and whose testimony required independent corroboration, Article 43.06, V.A.P.C., Texas Penal Code, and Donnie Ray Tiller, a known dope addict and dealer, and police informant, currently taking "speed" without interference from local law enforcement officials.

The bulk of Tiller's testimony involved Barefoot's alleged predictions about robberies and killing an oriental looking police officer from Harker Heights because [he] "had roughed him [Barefoot] up during an arrest for public intoxication(1412). Barefoot supposedly told Tiller [he] would read about [Barefoot] in the news for killing a Harker Heights cop. In mid June, 1978, Barefoot "detailed" plans to Tiller about robbing the Oasis Club (1414) after burning a building to create a diversion (1416). Barefoot didn't have a gun but was always asking Tiller for one. When the full plans for the arson, killing and robbery were laid out, both [Tiller and Barefoot] were comiong off speed (1418). Tiller last saw Barefoot about 4:30 p.m. on the 6th of August. Tiller refused to give Barefoot a ride to his girlfriend's house because he was out of gas, but drove Roberson to work half an hour later.

Tiller and Roberson both worked for Yellow Cab in Kileen. Roberson finished his shift at 4 a.m., on Sunday morning, August 7, 1978 and drove off in a 1966 blue Chevy Impala station wagon. The next thing he heard was the six o'clock news reporting the shooting of the Harker Heights police officer.

Tiller claims he received a telephone call from Barefoot about 10:45 a.m. on August 7, 1978 admitting "I shot him in the head." Tiller said he called Carl Trippet at 11. Carl Trippet said he called Tiller at 9 a.m.

John Hernandez was with Barefoot from about 9 a.m. on the morning hours after the shooting. Barefoot didn't brag. He denied being the killer, although he told Hernandez that he knew they [police] were looking for him for a killing he didn't do.

Tiller said Barefoot had a .32.caliber pistol. A man named "Billy Mack" never further identified to any degree helped Barefoot plan the arson and robbery.

Tiller did nothing to stop the planning or execution of these plans to break the law (1420). He had previously been charged with a burglary but got "cut loose" because he told the police that his roommates were the real robbers (1436) and had cooperated with the police on a couple of other occasions (1436).

Robert Roberson, the Accomplice as a matter of law, was a former "military" man, stationed at Fort Hood. He had been discharged about eighteen months before the shooting (R 1497). Roberson, Tiller and Barefoot lived together in a trailer with two prostitutes (R 1505) He met Darren Callier, aka Barefoot when he tried to sell him some speed in June, 1978. They began living together. Barefoot's contributions to the living expenses was sharing speed he bought and buying groceries, "same as paying rent." (1509). Barefoot didn't have a car. (R 1510).

Roberson testified on direct that Barefoot only talked in general about a "couple of jobs he's like to pull if he needed some quick money."(1512).

Roberson worked for Yellow Cab. His usual hours were four in the afternoon to four in the morning. He didn't see Barefoot on Sunday, August 6, 1978. Roberson got off work about 4:15 a.m. on August 7, 1978. He drove to the trailer in the blue chevy station wagon and got to bed with Debbie (R 1516) when Barefoot burst in saying "[he] just had to go and do something...[he] had to go to Harker Heights (1518). Roberson took him. They left the trailer about 4:50 in Kileen and headed for Harker Heights in Tiller's car (1519). Roberson said Barefoot had a bomb, an empty milk jug, and a .25 caliber loaded pistol. Roberson checked it himself so he knew it was loaded (1520).

Roberson told the jury that Barefoot was going to burn down Joe's place because Joe wanted the insurance money (1523). Roberson and Barefoot bought the gasoline and put it in the milk jug. Roberson claimed that he then "abandoned" Barefoot and returned to the trailer taking the bomb with him that Barefoot left in the car (cf: Gerhard's affidavit).

Roberson, said Barefoot was going to burn the Silver Spur but he wouldn't drive him there because he didn't want to get get involved (R 1527). The trial court, however, charged the jury the Roberson was an accomplice to the arson and, under the Texas law, a party to the offense of capital murder.

Roberson testified that he was back at the trailer and in bed by five minutes after five, and the next thing he knew the police were at his door (1529) looking for Darren. Roberson wasn't sure what time the police came by the first time or how

they happened to be looking for Darren in the first place. Roberson said Barefoot returned to the trailer around nine o'clock (cf: Hernandez testimony) and that he was "nervous and had red splotches on him". Barefoot changed clothes. He told Roberson that the police were looking for him because he had wasted a copy (1533) and he demonstrated for Roberson just how he did it. The white T-shirt was left in the trailer but never turned over to the police or found in a police search of the trailer some time later. Roberson said he didn't see the gun again. Roberson did note that Barefoot was still wearing his hat, and did have a mustache(1537) when he returned to the trailer after the shooting. Roberson didn't call the police so he wouldn't get involved (1538). Roberson put the bomb in a dumpster at Gibson's. He never gave it to the police or told them where it was. The police came to see Roberson a couple of more times and on August 8, 1978, he gave them a written statement after being apprised of his constitutional rights. (1540)

On cross-examination, Roberson told the jury that his trailer burned about a month after the shooting and he lost his job with yellow cab and didn't see any point in getting another since he's have to take off work to come back and testify (1545). Roberson admitted that his drug habits often had him high on speed for five or six days (1555) at a time. Barefoot was nicknamed the "pet" because he followed everyone around and kept house for them. He said the reason Barefoot hadn't been working probably was because he couldn't due to an infection on his wrist after an on job injury. On the 6th or 7th of August, 1978, Roberson admitted that he had been up for about three days straight, speeding (1567).

Roberson said Barefoot didn't mention anything about a robbery (1577). Roberson described Barefoot to Officer Kolrudis when they came to the trailer: "5'6" tall, with long red hair down to his nect, and he had a mustache and he was short and stocky."(1579)

On August 8, 1978, Roberson gave a written statement to the Harker Heights police. Roberson's trial testimony differed in the following material respects from his written statement: (1585-1587)

1. In his written statement he said he didn't know the caliber of gun Barefoot had
2. He didn't tell police that Barefoot had reburned to the trailer at nine o'clock the morning of the shooting.
3. He didn't tell police that Barefoot admitting shooting anybody.
4. He didn't tell the police that Barefoot had changed his clothes.
5. He didn't tell police anything about a bomb.
6. He obviously forgot about the hat Barefoot left and returned with, the blue denim hat with the GMC logo.

The above testimony was either disregarded or overlooked, becsuse of time limitations, by the Court of Appeals. It bore directly upon the question that should have been considered by the Court: was there a substantial question that required the Court of stay the execution pending determination of the appeal. Where the basic allegation, raised by Richards' sworn testimony, is prosecutorial misconduct, any equity considerations should clearly be resolved in the petitioner's favor. The test used by the Court, and advocated by the respondent, that the matter should be resolved on the merits at the Stay proceedings, was erroneous and was itself a violation of due process of law.

The United States District Judge who decided the habeas corpus proceedings below, and who issued a certificate of probable cause and permitted petitioner to appeal in forma pauperis, has ordered an evidentiary hearing for 1:30 p.m. on Monday, January 24, 1983. This fact alone should carry some weight with this Court and demonstrate the fundamental inequity of the procedure used by the Court of Appeals.

The necessity for such a hearing is demonstrated by petitioner's Exhibit "A", attached hereto, a copy of the notes made by the investigator for defense counsel after his interview with Mary Richards. This statement, if presented at an evidentiary hearing, would clearly refute the holding of the Court of Appeals that "if she had told everybody and the investigator for the defense of her description of the man she saw, as she now says she did, that would have been played to the hilt by the defense." The exact opposite will be shown at an evidentiary hearing by the testimony of both the investigator and defense counsel.

The statement of Robert Gerhard, attached hereto as Exhibit "B", raises further issues as to whether or not petitioner was the trigger man in this cause, a fact that would have great weight on a determinatin of punishment. The facts present a plausible hypothesis that Robertson, rather than petitioner, was the killer.

The foregoing cursory examination of the record clearly demonstrates that the Court of Appeals erred in each of the seven conclusions upon which it based it denial of the Motion to stay petitioner's execution.

CONCLUSION AND PRAYER

This case is a prime example of the dangers inherent in

the present practice of short circuiting the usual due process safeguards in the interest of speedy executions, regardless of the irrevocable consequences of such restricted procedure. The appellant who seeks monetary damages, or relief from a term of imprisonment receives the full panoply of federal safeguards and full rights of appeal. Not so for a person convicted of capital murder.

The petitioner, Thomas A. Barefoot, prays that the Court, based upon his original motion for stay of execution and this supplemental motion, stay his execution, scheduled before sunrise on January 25, 1983, pending determination of his appeal; the issues of first impression raised by his petition for writ of habeas corpus; and the conflict between two United States District Courts in Texas.

Petitioner prays that this Court stay his execution and set aside the order of the Court below.

Respectfully submitted

Will Gray
2038 Lexington Street
Houston, Texas 77098
713/759-0585

Carolyn Garcia
2038 Lexington Street
Houston, Texas 77098
713/524-5007

Petitioner's lawyers

DETECTIVE INVESTIGATOR RAY GARRISON'S NOTES OF INTERVIEW WITH MARY RICHARDS
DATED 11/11/78

"I interviewed Mrs. Mary Richards, 111 East Valley Road, Harker Heights, Texas, at the Oasis Club, Harker Heights, Texas, at about 7:20 p.m. this date

"Mrs. Richards says that she had rather not talk to me or Barefoot's attorneys unless it was at a meeting with the D.A.'s personnel present.

"She stated that she had better tell everyone again at the same time that she usually get up at between 5:30 a.m. and 6:00 a.m. every morning;
that she was awake at about this time on the morning of August 7, 1978;
that she was startled when she heard a sound like a gunshot;
that she remembers thinking it was a gunshot when she heard the second shot;
that her bedroom window faces Valley Road;
that a window pane was broken from the window so she poke her head out the window, almost to the window screen;
that she saw a man hurrying along Valley Road going West;
that she thought at the time, maybe someone has been shot and the man was going for help;
that because she saw him, she made a close facial study of the man;
that she studied the man's build and facial features as he passed in front of four houses across the street;
that she started to say "hey" to him a couple of times so that she might see a frontal view of his face;
that the street light in front of her house was on;
When the undersigned attempted to question her with reference to clothing worn by the man, she stated she'd rather describe that at the meeting.
She added that she did not know Barefoot;
that she had never seen Barefoot;
that she thought or felt sure that she could identify the man she saw on August 7, 1978, if she saw him again and added that if she was not sure, she would not say that Barefoot was the man. She kept repeating that she would not identify the wrong person. "

_____
RAY GARRISON

Investigator's Note: This will be a strong witness for the State. She apparently has her story together and her statement should be obtained by the D.A.'s office by Attorney Brown and Blyte. Very cooperative witness. She has been served to appear in the courtroom.

EXHIBIT "A"

STATE OF TEXAS
COUNTY OF BRAZORIA

My name is ROBERT GERHARD, I am an inmate at the Texas Department of Corrections, ~~Ramsey~~ Darrington Unit. I am serving a fifteen year sentence for Burglary.

I witnessed a shooting that occurred in Harker Heights, Texas outside a Western night club. I was driving by the club late at night with a friend JOSHUA COCHRAN, when I heard a shot. There could have been more shots, I don't recall. After I heard the shot, I saw two white males in the parking lot of the club. I pulled my car over & saw one of the men get ~~back~~ into a car. I don't remember the type of vehicle, but this man was standing outside the vehicle when the shooting occurred.

The man who got into the car was 5'10" to 6'0" tall, ~~stright~~ slender built, with a clean shaved face. I don't recall the length or color of his hair. I stayed there for about five minutes or less, until I saw the police arrive. As the police drive up, I drove off & this is the last time I saw the man in the car. During this time I was about 50' to 60' ~~feet~~ from the man in the car.

BEFORE ME, this the 20th day of January, 1983, personally appeared ROBERT GERHARD, who after being duly sworn by me, stated that the above statement is true & correct to the best of his knowledge & belief.

my commission expires 7-15-84

NOTARY PUBLIC IN & FOR BRAZORIA CO., TEX

EXHIBIT "B"

CERTIFICATION-

I certify that I mailed two copies of this Supplemental Motion for Stay of Execution was mailed to postage prepaid to: Mr. Douglas Becker, Assistant Attorney General of Texas, Supreme Court Building, P. O. Box 12584, Austin, Texas, 78711, on January 21, 1983.

Will Gray

Office-Supreme Court, U.S.
FILED
MAR 11 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-6080

In the Supreme Court of the United States

OCTOBER TERM, 1982

THOMAS A. BAREFOOT, PETITIONER

v.

W. J. ESTELLE, JR., DIRECTOR
TEXAS DEPARTMENT OF CORRECTIONS, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOINT APPENDIX

*WILL GRAY
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PETITION FOR CERTIORARI FILED JANUARY 24, 1983
CERTIORARI GRANTED JANUARY 24, 1983

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RELEVANT DOCKET ENTRIES

June 2, 1980: affirmance of conviction and death penalty by Texas Court of Criminal Appeals.

July 29, 1980: execution date set for October 13, 1981.

October 6, 1981: application for writ of habeas corpus denied by trial court.

October 9, 1981: Stay of execution granted by U.S. District Court pending consideration of writ of habeas corpus.

July 28, 1982: Evidentiary hearing federal district court.

September 28, 1982: Respondent's proposed findings of facts and conclusions of law filed.

November 5, 1982: Petitioner's proposed findings of facts and conclusions of law filed.

November 9, 1982: Court's findings of facts and conclusions of law filed denying habeas relief, dissolving stay of execution, and granting Petitioner's Motion for issuance of Certificate of Probable Cause and Motion to proceed in Forma Pauperis.

November 24, 1982: Notice of Appeal filed.

December 13, 1982: Certificate of Probable Cause filed.

December 20, 1982: Trial court set new execution date for January 25, 1983: Petitioner's plea to the jurisdiction denied.

December 20, 1982: Application for writ of habeas corpus and Motion for Stay of Execution filed in Texas Court of Criminal Appeals.

January 7, 1983: Notice from Texas Court of criminal appeals that application for writ of habeas corpus denied.

January 10, 1983: Motion for Stay of Execution filed with Texas Court of Criminal Appeals, denied January 11, 1983.

January 14, 1983: Motion for Stay of Execution filed in Court of Appeals for the Fifth Circuit.

January 17, 1983: Parties Notified to present briefs and arguments before Court of Appeals for the Fifth Circuit.

January 19, 1983: Briefs and oral arguments before Fifth Circuit.

January 20, 1983: Judgment of Fifth Circuit denying Stay of Execution.

January 21, 1983: Motion for Stay of Execution filed in United States Supreme Court.

January 24, 1983: Petition for certiorari filed and certiorari granted.

IN DISTRICT COURT
BELL COUNTY, TEXAS
27TH JUDICIAL DISTRICT

No. 26,812

THE STATE OF TEXAS

v.

THOMAS A. BAREFOOT AKA DARREN CALLIER

THE COURT'S CHARGE

MEMBERS OF THE JURY:

Having found the defendant, Thomas A. Barefoot AKA Darren Callier, guilty of the offense of capital murder, it now becomes your duty in reaching special verdicts to answer issues one and two hereinafter submitted to you.

The state must prove each issue submitted beyond a reasonable doubt.

You are instructed that you may not answer either issue "yes" unless the jury unanimously concurs, and, in such event, the special verdict is signed by your foreman. You may not answer either issue "No" unless ten or more of the jurors concur, and, in such event, the ten or more jurors concurring shall individually sign the special verdict. However, if the jury unanamously concurs in answering "No" on either issue, the special verdict shall be signed only by the foreman.

The punishment for the offense of capital murder in this state is death or confinement in the Texas Department of Corrections for life.

You are further instructed that if the jury returns an affirmative finding on each of the two issues submitted, this court shall sentence the defendant to death. If the jury returns a negative finding on either issue submitted, the

court shall sentence the defendant to confinement in the Texas Department of Corrections for life.

The burden of proof is on the State. You are the exclusive judges of the facts proved, of the credibility of the witnesses, and of the weight to be given to the testimony, but you are bound to receive the law from the court, which is herein given you, and be governed thereby.

During your deliberations you are not to consider or discuss any possible actions of the Board of Pardons and Paroles or the Governor nor how long this defendant will be required to serve on a sentence of life imprisonment.

You are further instructed that in determining each of these special issues you may take into consideration all of the evidence submitted to you in the full trial of the case, that is, all of the evidence submitted to you in the trial of the first phase of this case, wherein you were called upon to determine the guilt or innocence of the defendant, and all of the evidence, if any, admitted before you in the second phase of the trial, wherein you are called upon to determine the special issues hereby submitted to you.

There has been introduced the testimony of certain witnesses who purport to be skilled in their line of endeavor. Such witnesses are known in law as expert witnesses. An expert witness is one who is skilled in any certain science, art, business, or profession and possessed a peculiar knowledge acquired by study, observation and practice. You, the jury, are instructed that you may consider the testimony of these witnesses and give it such weight and value as you think it should have, but the weight and value to be given their testimony is for you to determine.

The testimony of any expert, like that of any other witness, is to be received by you and given such weight and value as you deem it is entitled to receive.

/s/ _____

Judge Presiding

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

No. W-81-CA-191

THOMAS BAREFOOT

v.

W. J. ESTELLE, JR.

FINDINGS OF FACT AND CONCLUSION OF LAW—NOVEMBER 9, 1982

This case was tried on July 28, 1982, before the Court. After hearing the testimony, exhibits and pleadings, and the arguments of counsel, the Court enters the following Findings of Fact and Conclusions of law:

FINDINGS OF FACT

1. This is a habeas corpus case brought by a state prisoner on death row under 28 U.S.C. 2254. Respondent has custody of Petitioner pursuant to a judgment and sentence of the 27th District Court of Bell County, Texas. Petitioner was indicted for the offense of capital murder. On November 14, 1978, Petitioner was tried before a jury which found him guilty of capital murder. The same jury answered two special issue questions on punishment in the affirmative, thus resulting in a sentence of death. Upon automatic appeal to the Texas Court of Criminal Appeals, the conviction was affirmed on June 2, 1980. *Barefoot* v. *State*, 596 S.W.2d 875 (Tex. Crim. App. 1980). Thereafter, Petitioner was sentenced to die by injection before sunrise on September 17, 1980.

2. On July 29, 1980, a stay of execution was granted by the Supreme Court of the United States pending the filing of a petition for writ of certiorari. The petition was filed in Cause No. 80-5320 on August 27, 1980, and on June 29, 1981, the petition was denied and the stay of execution was

dissolved. On August 14, 1981, Petitioner was again sentenced to death by the trial court which set his execution sometime before sunrise on October 13, 1981.

3. Petitioner then filed an application for writ of habeas corpus in state court on September 29, 1981. This application was denied by the Texas Court of Criminal Appeals on October 7, 1981. On October 9, 1981, in this cause under No. A-81-CA-422, Petitioner's execution was stayed pending consideration of his application for writ of habeas corpus. This Court conducted an evidentiary hearing in this cause on July 28, 1982.

4. At the evidentiary hearing, Respondent was represented by Assistant Attorney General Douglas M. Becker. Petitioner was represented by his appointed counsel, Will Gray.

5. There are virtually no disputed facts relating to the issues raised by the parties in this case. The Pre-Trial Order signed by the parties lists but one contested material issue of fact: whether Petitioner's counsel at the time of trial understood *Witherspoon* v. *Illinois*, 391 U.S. 510, 88 S.Ct. 1770 (1968).

6. Essentially, Petitioner claims that one prospective juror, Ruby Sanders, was excluded in violation of *Witherspoon* and that his attorneys were ineffective for failing to object upon that basis. He contends that his attorneys were further ineffective because of their lack of understanding of *Witherspoon* generally and because they allowed the voir dire to be conducted in such a manner as to deprive Petitioner of due process of law. He contends that the entirety of the voir dire examination produced a jury organized to return a death penalty in violation of *Witherspoon* v. *Illinois*, supra. Petitioner also complains of the use of hypothetical questions at the punishment phase of his trial. Two psychiatrists, neither of whom had examined Petitioner, testified on the basis of a lengthy hypothetical question that, in their opinion, if Petitioner were not given the death penalty, he would continue to commit future acts of violence that would pose a danger to society. Finally, Petitioner complains that Tex. Code Crim. Proc. Ann. Art. 37.071, is unconstitutional because it contains no provisions for

directing the jury's consideration of mitigating circumstances.

7. Respondent denies each of these contentions. In addition, he asserts that Petitioner's complaints about the trial court's treatment of particular venirepersons was waived for Petitioner's failure to object at trial. Respondent further relies upon the presumption of correctness of state court findings of fact regarding this issue under *Sumner* v. *Mata*, 449 U.S. 559, 101 S.Ct. 764 (1981). Respondent also relies upon the state court findings of fact with respect to the quality of representation Petitioner received from his two appointed counsel. With respect to the use of psychiatric testimony, Respondent denies that such testimony is inherently unreliable and argues that *Jurek* v. *Texas*, 428 U.S. 262, 96 S.Ct. 2950 (1976), and *Estelle* v. *Smith*, 451 U.S. ____, 101 S.Ct. 1866 (1981), specifically endorse such testimony. Respondent also alleges that for his failure to make proper objection at trial, Petitioner has procedurally defaulted this ground under *Wainwright* v. *Sykes*, 433 U.S. 72, 97 S.Ct. 2497 (1977). Finally, Respondent relies upon *Jurek* v. *Texas*, supra, for the proposition that the Texas death penalty statute is constitutional.

8. The easiest issue will be dealt with first. The Texas capital sentencing procedure guides and focuses the jury's consideration of mitigating circumstances. In *Jurek* v. *Texas*, 478 U.S. 262, 272-73, 96 S.Ct. 2950, 2956-57 (1976), the United States Supreme Court held that "... the Texas capital sentencing procedure guides and focuses the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender before it can impose a sentence of death." Thus, even though the Texas capital sentencing procedure does not explicitly mention mitigating circumstances, the procedure in itself directs the jury's consideration to mitigating circumstances.

The record reflects that the trial court instructed the jury on punishment as follows:

> You are further instructed that in determining each of these special issues you may take into consideration *all of the evidence submitted to you* in the full trial of the case, that is, all of the evidence submitted to you

> in the trial of the first phase of this case, wherein you were called upon to determine the guilt or innocence of the defendant, and all of the evidence, if any, admitted before you in the second phase of the trial, wherein you are called upon to determine the special issues hereby submitted to you (emphasis added).

This instruction provided for the jury's consideration of both mitigating and aggravating circumstances. The Texas Court of Criminal Appeals has often held that defendants in death penalty cases are entitled to extremely wide latitude in submitting mitigating evidence to the jury. The Texas procedures have been upheld many times, both in the state and federal courts. Petitioner points to no evidence whatsoever that he was prevented from producing at the punishment phase of trial. He makes no complaint that he was precluded from arguing that the import of certain evidence was mitigating. In the absence of any such allegations, his claim is without merit, and must be denied. He makes a general complaint that the trial court's charge ought to have directed greater attention toward mitigating circumstances, but the jury was instructed to take into consideration *all* of the evidence in the trial. Moreover, Petitioner made no objection to the trial court's charge upon this basis at trial. Accordingly, any error was waived. *Wainwright* v. *Sykes*, 433 U.S. 72, 97 S.Ct. 2497 (1977).

9. Petitioner also raises claims relating to the treatment of 44 venirepersons by the trial court and the conduct of his trial counsel in that regard. The complaint that Petitioner's appointed counsel, Gerald Brown and Stephen Blythe, were incompetent and did not understand *Witherspoon* is frivolous. Both attorneys testified before this Court at the evidentiary hearing in this cause. Each attorney is highly knowledgeable in criminal law. Mr. Brown is a Board Certified Specialist in the State of Texas in Criminal Law. Each attorney testified in depth that before voir dire examination began, and after consultation with a psychologist, a profile was constructed of the ideal juror from Petitioner BAREFOOT's point of view, relying particularly upon Brown's and Blythe's knowledge of local circumstances and conditions. A coherent plan for the use of peremptory chal-

lenges was devised. The plan was modified in accordance with Petitioner BAREFOOT's animosity towards black and brown persons. There was a feeling that possibly Petitioner's animosity toward these persons might be communicated to them if they were selected for the jury. No person was rejected for services of juror by Petitioner's attorneys solely because he was black or brown, as they testified, but it was one additional factor in the equation. It was the Petitioner's request his attorneys consider this factor in that equation.

10. During voir dire examination, the attorneys consulted frequently and at length with their client. Decisions as to each prospective juror were reached mutually and after much discussion. Petitioner has complained that his attorneys failed to object to the exclusion of a great number of jurors who were not necessarily disqualified under *Witherspoon*. Since Brown and Blythe had retained their jury notes from trial, they refreshed their memory to some extent and were able to testify at the evidentiary hearing in detail as to the specific reasons, based upon trial strategy, as to why no objections were made to the exclusion of every single prospective juror about whom Petitioner had complained. Because a decision not to object to the exclusion of a juror was in every instance based upon reasonable strategy, Petitioner's asserted ground for relief must be rejected for that reason alone. The attorneys' strategy in every instance appears to this Court to have been a tactical decision based upon the attorneys' individualized knowledge of local conditions and circumstances and in conformance with the previously constructed juror profile.

11. Petitioner complains that venireperson Ruby Sanders was qualified for jury service under *Witherspoon* and should not have been excluded. The following question and answer during voir dire examination indicate that Petitioner's allegation is without merit.

> "Q. And that's why we're asking you all these questions, Mrs. Sanders. Do you feel then that no matter what facts in any case might show that you, if you are on the jury, if someone forced you to be on

a jury, that you could never vote in a case that would assess the death penalty on somebody because of what you believe and what you have already told me?

"A. *Yes, sir, that's right.* I don't think that I can feel right even if I was on the jury and convicted an individual, I don't think that my conscience would allow me to continue to live on knowing that I am sentimental and believe in capital punishment or death or into this world." (emphasis added)

Since Mrs. Sanders testified she could never vote to assess a death penalty in any case, she was disqualified for jury service under *Witherspoon*. Moreover, the failure of Petitioner's counsel to object waived any error. *Wainwright* v. *Sykes*, 433 U.S. 72, 97 S.Ct. 2497 (1977); *Spinkellink* v. *Wainwright*, 578 F.2d 582 (5th Cir. 1978). The state court's finding on this matter is presumptively correct. *Sumner* v. *Mata*, 449 U.S. 559, 101 S.Ct. 764 (1981). At the evidentiary hearing in this cause, Petitioner's attorneys explained that even though they did not believe that Sanders was qualified for jury service under *Witherspoon*, there were additional, independent tactical reasons why they did *not* wish her to be on Petitioner's jury, even if she might have been rehabilitated. For these reasons, Petitioner does not satisfy the good cause exception of *Wainwright* v. *Sykes*. *See also: Engle* v. *Isaac*, Slip Op. No. 80-1430 (U.S., April 5, 1982).

12. Petitioner's allegation that the entire jury voir dire was fundamentally unfair and was organized to select a jury that would return the death verdict in violation of *Witherspoon* is without merit. Respondent's Answer catalogs the venirepersons of whom Petitioner has complained. Of the 44 venirepersons of whom Petitioner complains, 28 were dismissed without objection. In five cases, Petitioner's motion to disqualify a juror was overruled. In eleven other cases, Petitioner does not object to the exclusion of a juror or the trial court's overruling his motion to exclude a juror, but objects instead to statements the prosecutor made without objection to such prospective jurors.

13. Regarding the first group of 28 jurors, many were excused for entirely innocuous reasons, such as an ill spouse or a job important to the welfare of the community, such as teaching public school, and often before any opinion as to the death penalty had been expressed. In most of these cases, defense counsel affirmatively agreed to the exclusion of such jurors and no objection was made to the exclusion of any of them. At the evidentiary hearing in this Court, Petitioner's trial attorneys were able to explain why they and Petitioner mutually agreed that they did not desire each of these jurors to be selected. Nor error is shown.

14. Next, Petitioner's motions to exclude five jurors, Korpiva, Baker, Walker, Latsha, and Smith, were rejected by the trial court. The Texas Court of Criminal Appeals dealt at length with Petitioner's motions to exclude Korpiva, Latsha, and Smith. *Barefoot* v. *Smith*, 596 S.W.2d 875, 881-86 (Tex. Crim. App. 1980) (en banc). None was subject to dismissal for reasons set forth therein. Moreover, this finding by the highest Texas appellate court of criminal jurisdiction is presumptively correct. *Sumner* v. *Mata*, *supra*.

15. Petitioner's objection to venireperson Baker was that he could not be fair because of overexposure to publicity concerning the case. In light of his unequivocal statement that he could be fair and impartial, Petitioner's motion to exclude him was meritless. Petitioner's objection to venireperson Walker was similarly without merit. Petitioner's complaint that Walker showed himself to be "patently committed to the death penalty" must be rejected in view of the lengthy rehabilitation by the prosecutor. Moreover, it does not appear that Petitioner ever renewed his objection following that rehabilitation; accordingly, it was procedurally defaulted. *Wainwright* v. *Sykes*, supra.

16. Additionally, Petitioner complains that the prosecutor misinformed 11 jurors as to the law. He has been unable, however, to specify any misstatements of law in the record. It appears that the prosecutor merely discussed the applicable law generally to such venirepersons. In the event any incidental misstatement of law was made, it does not approach the level of denial of due process of law.

Moreover, Petitioner's attorneys did not object to any of such statements. Accordingly, Petitioner is procedurally defaulted under *Wainwright* v. *Sykes*, supra, from complaining about them now. Petitioner's attorneys also explained at the evidentiary hearing that, regarding an incidental misstatement, it is possible they might not have objected for one of several reasons. First, as a matter of strategy, they might have been interested in the juror's response to a particular question and felt that the question was not unduly prejudicial. Second, the prosecutor might have misstated the law in a matter not prejudicial to Petitioner or, at most, neutral as to him. Attorneys are expected to exercise their professional judgment in choosing the proper time and subject to raise their objections.

17. Petitioner also complains about hypothetical questions posed to psychiatrists at the punishment phase of his trial. Upon careful reflection, this ground is without merit. In *Jurek* v. *Texas*, 428 U.S. 262, 96 S.Ct. 2950 (1976), and *Estelle* v. *Smith*, 451 U.S.____, 101 S.Ct. 1866 (1981), the Supreme Court of the United States specifically upheld the predictive nature of the Texas capital punishment sentencing process, and further, specifically upheld the use of psychiatric testimony on the issue of future dangerousness as a matter that may be considered by the jury. The holding of those cases is that, although psychiatric testimony is valuable in assisting the jury in its consideration of future dangerousness, the Texas procedures quite properly are not *limited* to expert psychiatric testimony, but are also amenable to testimony by laypersons. In *Jurek*, supra, at 275-76, the Court stated:

> "[P]rediction of future criminal conduct is an essential element in many of the decisions rendered throughout our criminal justice system. The decision whether to admit a defendant to bail, for instance, must often turn on a judge's prediction of the defendant's future conduct. And any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose. For those sentenced to prison, those same predictions must be made by parole authorities. The task that a Texas jury must perform in answering the

statutory question in issue is thus basically no different from the task performed countless times each day throughout the American system of criminal justice." (footnotes omitted)

Additionally, in *Smith* v. *Estelle*, supra, at 1878, the Supreme Court stated, "While in no sense disapproving the use of psychiatric testimony bearing on the issue of future dangerousness, the holding in *Jurek* was guided by recognition that the inquiry mandated by Texas law does not require resort to medical experts."

18. The majority of psychiatric experts agree that where there is a pattern of repetitive assaultive and violent conduct, the accuracy of psychiatric predictions of future dangerousness dramatically rises.[1] The accuracy of this conclusion is reaffirmed by the expert medical testimony in this case at the evidentiary hearing. Dr. George Parker, a psychologist, testified for Respondent that professional literature indicates that predicting future dangerousness among random mental patients or even felons generally is not terribly accurate. The prediction of future dangerousness, however, becomes easier as the pattern and history of violence becomes more repetitively persuasive. Petitioner was diagnosed at trial as a sociopath, anti-social type, severe. Indeed, based upon the facts stated in the hypothetical question posed by the prosecutor at trial, all medical experts at the evidentiary hearing agreed with this diagnosis. Dr. Fred Fason, a psychiatrist who testified on behalf of Petitioner, testified that he was 90% sure that Petitioner was a severe anti-social sociopath who would commit future acts of violence dangerous to society. Dr. Wendell Dickerson, a psychologist, testified that he was almost 90% sure of the same decision. Dr. Richard Koons and Dr. Parker testified that they were extremely sure of the same conclusion.

19. It would appear that Petitioner's complaint is not the diagnosis and prediction made by Drs. Holbrook and Grigson at the punishment phase of his trial, but that Dr. Grigson expressed extreme certainty in his diagnosis and pre-

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[1] *See: Amicus curiae* brief of American Psychiatric Association in *Estelle* v. *Smith*, supra.

diction. Petitioner's experts have testified that such certainty is unsupportable in the medical profession. Moreover, Respondent's experts testified that they themselves could not be 100% sure in their diagnosis and prediction regarding Petitioner, but that they would be very close to completely certain.

20. In any event, the differences among the experts were quantitative, not qualitative. The differences in opinion go to the weight and not the admissibility of such testimony. The Court is unaware of any theory upon which the writ of habeas corpus may be granted or Petitioner's death penalty invalidated simply because an expert testified that he was competely certain rather than almost completely certain of a particular conclusion. Petitioner was not hampered in his cross-examination of the psychiatrists at trial. He was not precluded from presenting before the jury the identical testimony that he presented in the evidentiary hearing in this cause. Such disputes are within the province of the jury to resolve. Indeed, it is a fundamental premise of our entire system of criminal jurisprudence that the purpose of the jury is to sort out the true testimony from the false, the important matters from the unimportant matters, and, when called upon to do so, to give greater credence to one party's expert witnesses than another's. Such matters occur routinely in the American judicial system, both civil and criminal. If the state psychiatrists at trial erred in being overconfident as to their diagnosis of Petitioner, then Petitioner should have presented impeaching evidence or rebuttal testimony. Petitioner is not entitled to relief on this ground of asserted error.

CONCLUSION OF LAW

1. The Petitioner is not in custody, or sentenced, in violation of the Constitution or laws or treaties of the United States.

The Court will enter judgment in accordance with these findings.

SIGNED and ENTERED this 9th day of November, 1982.

/s/_____

LUCIUS D. BUNTON
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

No. W-81-CA-191

THOMAS BAREFOOT

v.

W. J. ESTELLE, JR.

JUDGMENT

In accordance with this Court's Findings of Fact and Conclusions of Law heretofore entered,

IT IS ORDERED, ADJUDGED and DECREED that Petitioner take nothing in this action and that Judgment be entered for Respondent herein.

SIGNED and ENTERED this 9th day of November, 1982.

/S/ LUCIUS D. BUNTON

LUCIUS D. BUNTON
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 82-1680

THOMAS A. BAREFOOT, PETITIONER-APPELLANT,

v.

W. J. ESTELLE, JR., DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,
RESPONDENT-APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

(January 20, 1983)

Before REAVLEY, RANDALL and JOLLY, *Circuit Judges*

PER CURIAM:

Thomas A. Barefoot was convicted in November, 1978 of murdering a Harker Heights police officer in Bell County, Texas on August 7, 1978.[1] The Court of Criminal Appeals of Texas affirmed the conviction on March 12, 1980 and denied rehearing on April 30, 1980. *Barefoot* v. *State*, 596 S.W.2d 875 (Tex. Crim. App. 1980). Barefoot was sentenced to die on September 17, 1980. The United States Supreme Court stayed execution and then dissolved the stay when certiorari was denied on June 29, 1981, 453 U.S. 913. Barefoot was again sentenced to die on October 13, 1981.

[1] The jury answered affirmatively to these questions of the Tex. Code of Crim. Ann. art. 37.071:

> (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
>
> (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.

The state district court denied habeas, as did the Court of Criminal Appeals. The federal district court then stayed the execution on October 9, 1981. After an evidentiary hearing, that federal court denied habeas corpus on November 11, 1982. The State of Texas moved to vacate the stay of execution and the court did vacate it on December 8, 1982. Because the district court granted certificate of probable cause, the denial of habeas is now on appeal in this court. Barefoot has now been resentenced and is to die before sunrise on January 25, 1983. Barefoot moves to stay execution of the sentence pending appeal.

Following the 1978 trial and conviction in Bell County, the Bell County District Court has reviewed the conviction on collateral attack, the Texas Court of Criminal Appeals has reviewed the conviction four times (once on direct appeal and three times on collateral attack), the Supreme Court of the United States has reviewed it on application for certiorari, and the federal district court has held an evidentiary hearing and—after 14 months—upheld the conviction.

1. THE NATURE OF OUR DECISION

This panel has studied the briefs and record filed with us and has conducted a hearing on January 19, 1983, at which the petitioner's attorney was allowed unlimited time to discuss any matter germane to the decision before us.

That decision is a limited one. This court may interfere with the action of the State of Texas only upon a showing that the Constitution of the United States has been violated. Upon the question of whether to stay execution until the appeal has been processed, we consider the likelihood of success of that appeal. *Ruiz* v. *Estelle*, 650 F.2d 555 (5th Cir. 1981). There should be a substantial case on the merits of any serious legal question involved in the appeal to warrant staying the decision below. *Ruiz* v. *Estelle*, 666 F.2d 854, 857 (5th Cir. 1982). If after all these years of study, no constitutional imperfections of substance can be found, it becomes the duty of this court to deny the stay and refuse to interfere with the authorities of the State of Texas as they follow the laws of that state.

2. THE TRIAL COURT'S CERTIFICATE OF PROBABLE CAUSE

We note that the district court's issuance of a certificate of probable cause bears upon our consideration here. In this circuit, "We have equated probable cause ... to a 'substantial showing of the denial of [a] federal right.'" *Stewart* v. *Beto*, 454 F.2d 268, 270 n.2 (5th Cir. 1971), *quoting Harris* v. *Ellis*, 204 F.2d 685, 686 (5th Cir. 1953). And if the denial of a certificate by a district judge should be given "weighty consideration" by a circuit judge, *Nowakowski* v. *Maroney*, 386 U.S. 542, 543 (1967), then the granting of a certificate should be entitled to similar treatment. However, this does not relieve us of our duty under Fed. R. App. P. 8 to decide the issue for ourselves. To give too much weight to the district court's issuance of the certificate would be to give it preclusive effect on our determination of the stay issue. Rule 8 clearly contemplates that it is the appellate court's responsibility to decide the merits of the stay.[2]

This court had the same question before it last month in *Brooks* v. *Estelle*, ____ F.2d ____. The stay was denied by this court and also by the Supreme Court. 51 U.S.L.W. 3469 (U.S. Dec. 6, 1982). Justices Brennan, Marshall and Stevens dissented from the denial of the stay. They argued that once a certificate of probable cause has been issued, the appellant "must then be afforded an opportunity to address the merits." *Garrison* v. *Patterson*, 391 U.S. 464, 466 (1968). *See also Nowakowski* v. *Maroney*, 386 U.S. 542, 543 (1967). ("When a district court grants a certificate of probable cause the court of appeals must ... proceed to a disposition of the appeal in accord with its ordinary procedure.")

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[2] This preclusive effect is also inconsistent with the district court's denial of the stay in the first instance. The district court must have thought that appellant did not meet the requirements of a stay. Yet, if we gave the C.P.C. preclusive effect, then we would in effect be saying that its issuance means that the district court thought petitioner is entitled to a stay.

The simple response to this argument is that since six members of the Court denied the petition for stay, this argument must have been rejected. We respectfully suggest, however, that *Nowakowski* and *Garrison* are inapposite here. In *Garrison*, the court of appeals upon motion for a certificate of probable cause, simultaneously granted the certificate and, without argument on the merits or explanation of its reasons, affirmed the district court. *Nowakowski* dealt with a denial of leave to proceed *in forma pauperis* once the district court had granted a certificate of probable cause. The Court's concern was the attempt by the appellate court to circumvent the district court's power to grant a habeas petitioner an appeal.

Neither of these cases addressed a situation in which the party had an opportunity to brief and argue the merits of the underlying issues, nor do they suggest that the stay procedure of Rule 8 is somehow abrogated by the granting of a certificate of probable cause. We think that this case is controlled by *Carafas* v. *LaVallee*, 29 U.S. 234 (1968), more than *Garrison* and *Nowakowski*. In *Carafas*, the Court, as in *Nowakowski*, reversed the second circuit's denial of leave to proceed *in forma pauperis*. The Court discussed *Nowakowski* and its implications. The Court stated:

> Nothing in the order entered by the Court of Appeals, however, indicates that the appeal was duly considered on its merits as *Nowakowski* requires in cases where a certificate of probable cause has been granted. Although *Nowakowski* does not necessarily require that the Court of Appeals give the parties full opportunity to submit briefs and argument in an appeal which, despite the issuance of the certificate of probable cause, is frivolous, enough must appear to demonstrate the basis for the court's summary action.

Id. at 242. Our actions here fall under this language. Petitioner's motion is directed solely to the merits. The parties have been also afforded an unlimited opportunity to make their contentions upon the underlying merits by briefs and oral argument. This opinion demonstrates the reasons for our decision. We think, therefore, that the arguments put forth by the dissenters in *Brooks* should not prevent us

from denying this stay if there is an indisputable absence of merit to the petitioner's complaint.

3. MERITS OF APPEAL: PSYCHIATRIC TESTIMONY ON DANGEROUSNESS

The sole issue that petitioner raises on appeal concerns testimony at the sentencing stage by two psychiatric experts regarding appellant's future dangerousness. Neither of these witnesses had interviewed petitioner, but testified on the basis of hypothetical questions. Petitioner argues that the admission of this testimony amounts to constitutional error.

The evidence before the federal district court supported its conclusion that the accuracy of psychiatric predictions of future dangerousness dramatically rises where there has been a pattern of repetitive assaultive and violent conduct. The majority of psychiatric experts accept that view. All of the experts have testified that the conduct of the petitioner, to which the assumed facts adhered in the hypothetical question put to the psychiatrists at the original trial, was the conduct of a severe sociopath. They disagreed over the degree of certainty with which future conduct could be predicted, but this only shows a difference of opinion among professionals—no rarity to the courts or to citizens who serve as jurors. We find no error of law or violation of the constitution in the admission into evidence of those opinions, the proper predicate having been laid.

Petitioner relies on *Green* v. *Georgia*, 442 U.S. 95 (1979), and *Gardner* v. *Florida*, 430 U.S. 349 (1977), for the proposition that the due process clause of the Fourteenth Amendment and the cruel and unusual punishment clause of the Eighth Amendment set limits upon the types of evidence that may be presented at a sentencing hearing. He then argues that the doctor's testimony is inherently unreliable. He asserts that the inaccuracy in predicting future dangerousness, particularly when no inerview has been conducted, requires that the testimony be excluded. He also argues that since the hypotheticals did not include the mitigating evidence, this increases the inaccuracy of the testimony and permits the jury to avoid consideration of the mitigating evidence by simply relying on the doctor's

testimony that the accused was a sociopath who would commit future acts of violence.

In *Gardner*, the Court dealt with a death sentence in which the trial judge rejected the jury's recommendation of a life sentence on the basis of a confidential pre-sentence investigation report which was not disclosed to the accused. The opinions of the Court reflect a concern not for a specific evidentiary rule, but for the nature of the adversary system and the need for the accused and his counsel to be able to respond to this evidence.

In *Green*, the state court excluded evidence that the accused's codefendant had actually killed the victim. This evidence consisted of a hearsay statement by the codefendant to a friend. The Court reversed, stating:

> Regardless of whether the proffered testimony comes within Georgia's hearsay rule, *under the facts of this case* its exclusion constituted a violation of the Due Process Clause of the Fourteenth Amendment. The excluded testimony was highly relevant to a critical issue, in the punishment phase of the trial ... (emphasis added)

442 U.S. at 97. We think that *Green* is limited to its facts, and certainly did not federalize the law of evidence. It does, however, indicate that certain egregious evidentiary errors may be redressed by the due process clause.

We think, however, that the Supreme Court has, by implication at least, approved of psychiatric testimony in cases such as these. In *Jurek* v. *Texas*, 428 U.S. 262 (1976), the Supreme Court rejected the argument that requiring the jury to predict future behavior is so vague and uncertain as to be meaningless. While the Court did not deal specifically with what types of evidence the jury may hear, the Court stated that a jury is equipped to make such a determination. The Court stated: "What is important is that the jury have *all possible relevant information* about the individual defendant...". Psychiatric testimony would clearly appear to be relevant to the jury's determination. The fact that such testimony may not always be totally accurate does not affect its relevance to the issue.

Further indication of the approval of psychiatric testimony is contained in *Estelle* v. *Smith*, ___ U.S. ___, 101 S.Ct. 1866 (1981). The Court dealt with whether the state could use psychiatric testimony at the sentencing stage when the testimony was based on an interview with the defendant and when (1) defendant's counsel was not notified and (2) the defendant was not warned of his right to remain silent. The Court held that this did violate the defendant's rights. The Court, however, went on to discuss the effect of its holding on the state's ability to prove dangerousness. The Court states:

> [U]nder the Texas capital sentencing procedure, the inquiry necessary for the jury's resolution of the future dangerousness issue is in no sense confined to the province of psychiatric experts....

___ U.S. at ___, 101 S.Ct. at 1878. The Court went on, saying

> While in no sense disapproving the use of psychiatric testimony bearing on the issue of future dangerousness, the holding in *Jurek* was guided by recognition that the inquiry mandated by Texas law does not require resort to medical experts.

Id. These statements indicate that expert testimony meets constitutional requirements for admissibility.

Petitioner argues that the Court was addressing the facts of *Smith*, where the psychiatrist had interviewed the defendant. But there is no indication in *Smith* that the discussion regarding psychiatric testimony was limited to testimony based on personal interviews. More importantly, we think to reject such testimony would be inconsistent with *Smith* and *Jurek*. In *Smith* the Court held that the state could not compel the defendant to submit to a psychiatric interview. Thus, were we to hold that a psychiatrist (or other mental health professional) could not testify on the basis of hypotheticals or an examination of the defendant's record, we would be giving the defendant the right to prevent any and all psychiatric testimony on the issue of dangerousness except psychiatric testimony in his own favor. We think this is inconsistent with the aim approved in *Jurek* that "the jury have before it all relevant informa-

tion." In addition, we note that if testimony by a mental health professional, trained to detect mental illness and personality types, is inherently unreliable on the issue of future dangerousness, then would not testimony and a decision by untutored lay persons on this issue be even more unreliable? The Supreme Court thinks otherwise as was shown in *Jurek* and *Smith* in holding that the jury could decide the issue and the inquiry mandated by Texas law does not require resort to medical experts." 101 S.Ct. at 1878.

4. JURISDICTION OF STATE COURT TO RESENTENCE

While the present appeal to this court was pending, the state district court set petitioner's execution date. Petitioner argued to the state court, the Court of Criminal Appeals and now before this court, that while this appeal is pending, the state court has no jurisdiction to resentence. Alternatively, he argues that if the state courts do have jurisdiction, then he is being denied equal protection of the laws because the Texas courts are closed to him.

These arguments have no merit. The first argument is actually a state law issue which we do not have the power to address in a habeas proceeding. Petitioner's second argument is based on Ex Parte Powers, 487 S.W.2d 101 (Tex. Crim. App. 1972), Ex Parte Green, 548 S.W.2d 914 (Tex. Crim. App. 1977), and Ex Parte McNeil, 588 S.W.2d 592 (Tex. Crim. App. 1979) (en banc). These cases stand for the proposition that

> A petitioner must decide which forum he will proceed in, because this Court will not, and a trial court in this State should not, consider a petitioner's application so long as the federal courts retain jurisdiction of the same matter.

Green, 548 S.W.2d at 916. We recently discussed this rule in depth, descriping it as a rule of habeas abstention based on comity. *Carter* v. *Estelle*, 677 F.2d 427 (5th Cir. 1982). We do not see how these cases have any application to this case. This rule is one of judicial efficiency which merely prevents the petitioner from litigating the same habeas issues in two forums at the same time. Setting an execution

date is clearly not a habeas suit. It is a collateral matter that is not part of the habeas suit. Such a rule would allow petitioner to suspend his sentencing whatever the lack of merit and entitlement to stay. We therefore reject this argument.

5. NEWLY DISCOVERED EVIDENCE: MARY RICHARDS

Petitioner fortells grounds for another try at habeas relief because of "newly discovered evidence." Petitioner's attorney interrogated Mary Richards under oath a few weeks ago, without the presence of a representative of the state, and her answers are said to conflict with her testimony for the state at Barefoot's trial and to raise questions of prosecutorial misconduct. We have before us the recent statement of Richards as well as her trial testimony.

Richards lived in the area where the killing occurred. She testified at the trial that she heard two shots that night and, when she looked out her window, she saw a man run by who resembled Barefoot. She now says that it could not have been Barefoot, because the hair and height and build of the two men differed. She says that she has always told everyone who interrogated her, including the investigator who worked for the attorneys defending Barefoot, and everybody she knows, about the true appearance of the man she saw. She explains her testimony at trial on the grounds that it was Barefoot's eye area that resembled the man she had seen and, further, that her testimony was false because an assistant district attorney and his investigator frightened her by telling her Barefoot intended to kill everyone in the office where she worked and that she should just answer the questions "yes" or "no."

It is difficult to accept this current statement of Richards. No rational prosecutor would have called her as a witness if she had told him what she now says she did. Her testimony was not important, to begin with. Her testimony of hearing two shots raised an inconsistency, because the other evidence, including that of an eye witness to the shooting, was that only one shot was fired. With the strong identification of Barefoot by the other witnesses, to place Mary Richards on the stand if she thought she had seen a

different man, would have only contributed another inconsistency. No attorney would have thought she could survive non-leading direct testimony and the cross-examination with only "yes" or "no." If she had told "everybody" and the investigator for the defense of her description of the man she saw, as she now says she did, that would have been played to the hilt by the defense.

Nevertheless, the testimony of Mary Richards, one way or the other, cannot and could not affect the determination of Barefoot's guilt. His presence on the scene was clearly established as was his guilt. He admitted (actually, boasted of) his guilt to his friends. The gun which fired the fatal shot was in his pocket when he was arrested. He had told others in advance that he planned to kill the Harker Heights policeman and that he was to commit a robbery after creating a diversion by setting fire to a building. A roommate testified that he dropped Barefoot off near the Silver Spur, a nightclub, at 5:00 am. A Fort Hood soldier saw a man, whom he identified at trial as Barefoot, standing in the parking lot of the Silver Spur watching the building burn. After reporting the fire, the soldier saw Barefoot again near Amy Lane. He told the officer this, and the officer drove his patrol car toward Amy Lane. Another soldier saw that officer get out of his car at the intersection of Amy Lane and Valley Road. A man wearing a white T-shirt and blue jeans, as Barefoot was dressed, stepped out of the bushes, walked to the officer and shot him in the head at point-blank range, and fled down Valley Road. (Mary Richards lived on Valley Road.)

Even if we were to assume for present purposes (and we would do so for no other purpose), that the prosecutor deliberately frightened Mary Richards to obtain her testimony and then sat by without disclosing that her testimony conflicted with her prior description, a reversal of the conviction would not be justified for the reason that the omitted evidence could not create a reasonable doubt of Barefoot's guilt, and the alleged prosecutorial conduct could not have an effect on the trial. *See Smith* v. *Phillips*, ___ U.S. ___, 102 S.Ct. 940 (1982); *United States* v. *Agurs*, 427 U.S. 97, 96 S.Ct. 2392 (1976).

This point has been raised and rejected by collateral attack in the Texas courts. There would be no justification for delay in order to have a further presentation in the federal courts.

6. CONCLUSION

This Court has had the benefit of the full trial court record except for a few exhibits unimportant to our consideration. We have read the arguments and materials filed by the parties. The petitioner is represented here, as he has been throughout the habeas corpus proceedings in state and federal courts, by a competent attorney experienced in this area of the law. We have heard full arguments in open court. Finding no patent substantial merit, or semblance thereof, to petitioner's constitutional objections, we must conclude and order that the motion for stay should be DENIED.

Supreme Court of the United States

No. 82-6080

THOMAS A. BAREFOOT, PETITIONER,

v.

W. J. ESTELLE, JR., DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS

ORDER ALLOWING CERTIORARI. Filed January 24, 1983.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit before judgment is granted.

Supreme Court of the United States

No. 82-6080

THOMAS A. BAREFOOT, PETITIONER,

v.

W. J. ESTELLE, JR., DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS

ON CONSIDERATION of the motion of petitioner for leave to proceed *in forma pauperis*,

IT IS ORDERED by this Court that the said motion be, and the same is hereby, granted.

FEBRUARY 28, 1983

JAN 21 PAGE 18 (a)

NO. A-638

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

THOMAS A. BAREFOOT,

Petitioner

V.

W. J. ESTELLE, JR.,

Respondent

On Petitioner's Motion For Stay Of Execution

RESPONDENT'S RESPONSE TO PETITIONER'S MOTION FOR STAY OF EXECUTION

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NO. _____

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RESPONDENT'S RESPONSE TO PETITIONER'S
MOTION FOR STAY OF EXECUTION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES W. J. Estelle, Jr., Respondent herein, and submits this his response to Petitioner's motion for stay of execution, which is presently scheduled for sometime before sunrise on January 25, 1983, in Huntsville, Texas.

I.

NATURE OF THE CASE

Petitioner Thomas A. Barefoot is scheduled to be executed sometime before sunrise on January 25, 1983, at the Texas Department of Corrections in Huntsville, Texas. On November 12, 1982, a federal district court denied Petitioner's application for writ of habeas corpus filed pursuant to 28 U.S.C. §2254. After notice of appeal was filed on November 24, 1982, the district court vacated its previously entered stay of execution on December 8, 1982, and granted a certificate of probable cause to appeal on December 13, 1982. After hearing oral argument on January 19, 1983, a panel of the United States Court of Appeals for the Fifth Circuit unanimously denied a stay of execution. The matter is now before the Court on Petitioner's motion.

Respondent submits this response without having viewed Petitioner's motion in this Court. Presumably he raises those matters raised in the court below. Essentially Respondent relies upon the response he filed in the Court of Appeals, which is attached hereto as Appendix, hereinafter "App." He also relies upon the same appendicies before the Court of Appeals, Apps. A-E, which are also attached hereto. Respondent has arranged for the Court of Appeals to deliver to the office of the Clerk of this Court a copy of the sixteen page opinion of the Court of Appeals. It should be delivered on the morning of January 21, 1983. Finally, Respondent submits as App. G one copy of the transcript of the evidentiary hearing conducted in this cause by the federal district court on July 28, 1982.

II.

PROCEDURAL HISTORY

Petitioner was convicted of the murder of a police officer. The crime was committed on August 8, 1978, and Petitioner was convicted on November 14, 1978. The Texas Court of Criminal Appeals affirmed the judgment of conviction on June 2, 1980, and this Court denied a petition for writ of certiorari on June 29, 1981.

Since then, Petitioner has raised his claims and relief was denied by the state habeas corpus convicting court on October 6, 1981, and by the Texas Court of Criminal Appeals on the same day. His second and third state habeas corpus applications were denied by the Texas Court of Criminal Appeals on December 21, 1982, and January 11, 1983, respectively.

A more detailed statement of the procedural history of the case appears in Apps. A, F, as well as in the opinion of the Court of Appeals below.

III.

STATEMENT OF FACTS

Two excellent, detailed statements of the state's case against Petitioner are available to the Court. The Court of Criminal Appeals summarized the important evidence in Barefoot v. State, 596 S.W.2d 875, 878-80 (Tex.Crim.App. 1980) (App. B). The state's answer in Petitioner's first state habeas corpus application also discussed the evidence against Petitioner (App. D at 1-8), as did the opinion of the Court of Appeals below.

Essentially, Petitioner told witnesses before he committed the crime the precise manner in which he was going to commit it; a witness carried him to the scene of the crime with the necessary implements in hand; he was positively identified near the scene of the crime; he admitted committing the crime to other witnesses afterwards; he quickly fled from Kileen, Texas, to Houston, Texas; and when he was arrested in Houston, he bore a gun in his back pocket that a ballistics expert testified was the same gun that fired the bullet that killed the police officer in this case.

At the punishment stage of Petitioner's bifurcated trial, the state presented, among other things, two psychiatrists. Neither had ever interviewed Petitioner, but testified upon the basis of hypothetical questions that the hypothetical person described in the hypotheticals, within reasonable psychiatric certainty, in the future would commit criminal acts of violence that would constitute a continuing threat to society. Under Tex. Code Crim. Proc. Ann. art. 37.071, the jury was required to find such a probability

before a sentence of death could be returned.

IV.

PETITIONER'S CLAIMS

Preliminary Matters

Petitioner has been granted a certificate of probable cause to appeal. This does not entitle him to an automatic stay of execution, however, as the Court agreed in Brooks v. Estelle, 51 U.S.L.W. 3469 (U.S., Dec. 6, 1982). The Court of Appeals so held, reasoning that this Court's cases cited by the dissenters in Brooks v. Estelle, supra, stand for the proposition that Petitioner is entitled only to a careful, reasoned disposition of the merits of his claims, after opportunity to brief those claims. The opinion of the Court of Appeals below reflects precisely such careful consideration, albeit in the procedural context of a motion to stay execution.

The parties have agreed that in that context, Petitioner is entitled to a stay of execution if he can demonstrate a reasonable judicial doubt about the outcome of any of the issues he would present during his full appeal. If he cannot create such a doubt, then the outcome of such an appeal is a fore-ordained conclusion, and the useless futility of a full appeal would be demonstrated.

Petitioner's Claims

1. Petitioner first argues that under state law, the state convicting court was without jurisdiction on December 20, 1982, when it sentenced him to be executed on January 25, 1983, because on December 20, his application for writ of habeas corpus was pending in the federal courts. The Court of Appeals below correctly stated that this is purely a matter of state law and that the issue was specifically rejected by the Texas Court of Criminal Appeals in Petitioner's state habeas corpus application filed and denied on December 20, 1982. One member of the panel in the Court of Appeals, Judge Randall, was the author of a recent opinion extensively discussing the Texas habeas corpus abstention doctrine relied upon by Petitioner. See, Carter v. Estelle, 677 F.2d 427 (5th Cir. 1982). The court held that it has no arguable application

to Petitioner's circumstances.

2. The Court of Appeals found no merit in Petitioner's claim that he was deprived of due process of law by the use of hypothetical questions posed to psychiatric experts at the punishment phase of his bifurcated trial. There is no violation of Estelle v. Smith, 451 U.S. 454 (1981), since neither of these psychiatrists had examined Petitioner. The psychiatrists instead predicted future dangerousness of a hypothetical defendant, based upon a lengthy hypothetical question asked by the prosecutor.

The Court of Appeals found that the accuracy of predictions of future dangerousness is established where there is a pattern of repetitive assaultive conduct, as in Petitioner's case. The court noted that all four experts who testified in the evidentiary hearing in federal district court -- none of which testified at Petitioner's trial -- agreed with the conclusion, based upon the same hypothetical question, reached by the psychiatrists who testified at Petitioner's trial. They disagreed only as to their degree of certainty of that conclusion. (App. G at 21-22, 43-44, 72-73, 117, 189-91, 204, 231-33).

The Court of Appeals found that Petitioner's argument that the hypothetical question deprived him of fundamental fairness because it failed to include mitigating circumstances was without merit because Petitioner's counsel were free upon cross-examination to ask a hypothetical question that included such circumstances. The Court of Appeals noted that this Court has approved the use of psychiatric testimony in the Texas capital punishment sentencing process in Jurek v. Texas, 428 U.S. 262, 275-76 (1976), and Estelle v. Smith, 451 U.S. 454, 473 (1981). Finally, the Court of Appeals noted that the rule contended for by Petitioner would effectively prevent the state from ever presenting psychiatric testimony at his trial, even in rebuttal of Petitioner's psychiatric testimony.

3. Petitioner raised a claim for the first time federally in the Court of Appeals that a witness at his trial, Mary Richards, had committed perjury and that the prosecutor had aided such perjury. Petitioner relied upon a deposition of Richards that he took on December 27, 1982.

Richards at trial testified that a few moments after she heard two shots, she looked out her window, at some distance from the scene of the crime, and saw a man running that resembled Petitioner, although she could not positively identify him. At the deposition she states her present opinion that her trial testimony was untrue because in fact, she knew the man she saw was not Petitioner. She contends that she testified as she did because agents of the prosecutor frightened her by telling her that Petitioner had threatened her.

It is fair to say that the Court of Appeals concluded that it is impossible not to doubt Richards's statements at her recent deposition. She was a minor witness in the case; no rational prosecutor would have troubled himself with calling a witness whose alleged testimony might jeopardize the entire prosecution.

Even assuming as true Petitioner's claim that Richards's testimony was perjured, and that the prosecution was guilty of misconduct in allowing such testimony to take place, the Court of Appeals concluded that her testimony was not material to the state's case under the standard set forth in Smith v. Phillips, ___ U.S. ___, 102 S.Ct. 940 (1982), and United States v. Agurs, 427 U.S. 97 (1976). Respondent argued in the court below that whether to grant a stay upon this issue should hinge upon whether the panel, after due consideration, held a reasonable judicial doubt that Richards's changed testimony could possibly have affected the jury's verdict, in light of the overwhelming evidence of guilt. The Court of Appeals concluded that it held no such doubt. Respondent suggests

that the evidence allows for no other conclusion.

On the afternoon of January 20, 1983, the undersigned attorney for Respondent was informed by the office of the Clerk, United States District Court for the Western District of Texas, that the federal district court in this case, having been informed that Petitioner intends to file a new federal habeas corpus application on January 21, 1983, has set the matter for an evidentiary hearing on January 24, 1983, in El Paso, Texas. The factual dispute underlying this claim may be determined at that time. If Petitioner re-raises this claim, as anticipated, Respondent will present several witnesses, as well as other evidence, to refute the contention that the prosecution in this case engaged in any impermissible conduct whatsoever. Even though the Court of Appeals has found that the allegedly perjurious conduct is as a matter of law immaterial under the applicable standard, Respondent welcomes the opportunity to dispel any serious suggestion that the prosecution in this case engaged in misconduct. If the district court entertains a reasonable doubt as to that matter after hearing this evidence, however, he will be in the best position to judge whether a stay of execution should be granted pending further evidentiary development.

V.

CONCLUSION

The infliction of the death penalty upon a member of society is an awesome act of great gravity. It is one that should be undertaken only after the federal and state courts have reviewed the merits of all of Petitioner's claims and found them to be insubstantial. Petitioner has received such review in this case. The Texas Legislature has promulgated the death penalty that will be applied in this case. This Court has upheld it. Numerous state and federal courts have found Petitioner's trial to be free of constitutional infirmity. The time comes in such a case to enforce the law. Respondent respectfully suggests that that time has now arrived.

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that on the 20th day of January, 1983, one copy of Respondent's Response to Petitioner's Motion for Stay was sent by Federal Express to Mr. Will Gray and Ms. Carolyn Garcia, Attorneys at Law, 2038 Lexington Street, Houston, Texas 77098. All parties required to be served have been served. I am a member of the Bar of this Court.

Douglas M. Becker
DOUGLAS M. BECKER
Assistant Attorney General

I declare under penalty of perjury that the above is true and correct.

January 20, 1983

Douglas M. Becker
DOUGLAS M. BECKER
Assistant Attorney General

Office-Supreme Court, U.S.
FILED
MAR 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-6080

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

THOMAS A. BAREFOOT, *Petitioner*,

v.

W. J. ESTELLE, JR, DIRECTOR
TEXAS DEPARTMENT OF CORRECTIONS, *Respondent*.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Whether the standards applied by the Court of Appeals for granting or denying a stay of execution pending disposition of an appeal by a federal habeas corpus petitioner under sentence of death violated the holdings in *Nowakowski* v. *Maroney*, 386 U.S. 542 (1967); *Carafas* v. *LaVallee*, 391 U.S. 234 (1968); and *Garrison* v. *Patterson*, 391 U.S. 464 (1968).

2. Whether the procedure used by the Court of Appeals in this case, to deny a federal habeas corpus petitioner's statutory right of appeal on a summary disposition of his motion to stay execution of his death sentence, violated the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

3. Whether psychiatric opinions adduced by the state at the punishment stage of the trial, that the probability was certain and absolute that petitioner would commit future acts of violence and would constitute a future danger to society, both in prison and out, so distorted the penalty function of the jury as to deprive petitioner of his rights under the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States, where neither of the witnesses had ever seen or examined the petitioner, and their testimony was based solely upon a "hypothetical" question which contained no medical or psychiatric information but was comprised of all the evidence previously heard by the jury at both stages of the trial, embellished with the prosecutor's conclusion drawn from the evidence, hearsay, thought processes of the named petitioner and named witnesses, jury argument, speculation, reputation testimony by prosecutors and law officers, all of which bolstered the state's evidence with the gloss of psychiatric expertise, even though the evidence required no such "expert" interpretation.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, denying petitioner's motion for a stay of execution is not yet reported. *Barefoot* v. *Estelle*, ____ F.2d ____, No. 82-1680, entered on January 20, 1983.

JURISDICTION

The order of the United States Court of Appeals for the Fifth Circuit, denying petitioner's application for a stay of execution of the sentence of death, was entered on January 20, 1983.

On January 24, 1983, this Court, treating petitioner's application for stay of execution as a petition for writ of certiorari before judgment, granted certiorari and stayed the execution and enforcement of petitioner's sentence of death pending the sending down of the judgment of the Court.

The jurisdiction of this Court is based upon 28 U.S.C. Sec. 1257(3).

OTHER ISSUES THAT WOULD HAVE BEEN RAISED ON APPEAL BELOW

1. Whether the Court of Appeals should have remanded this cause to the district court for a plenary hearing on the issue of prosecutorial misconduct based upon the sworn statement of Mrs. Mary Richards that she was frightened and coerced by the prosecutor and his investigator into falsely testifying that the petitioner resembled the man she saw running away from the scene of the murder, when she knew and informed the state at the time that petitioner was not that man.

2. Whether petitioner was denied due process of law and the effective assistance of counsel at the jury selection stage of the trial when his court-appointed attorneys failed to render reasonably effective assistance of counsel at this critical stage of the proceedings, in violation of the Sixth and Fourteenth Amendments to the Constitution of the United States.

3. Whether petitioner was deprived of his rights under the Sixth and Fourteenth Amendments to the Constitution of the United States, where the state's challenges for cause to numerous prospective jurors were considered under more liberal and different standards than were the same or similar challenges made by petitioner, this, in effect, granting the state additional peremptory challenges.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

2. It also involves the following Federal Statutes and rules, and state statutes (printed herein as appendix to this Brief):

a. 28 United States Code, Section 2253.

b. 28 United States Code, Section 2251.

c. 28 United States Code, Section 1915(a).

d. Rule 22(b), Federal Rules of Appellate Procedure.

e. Rule 8, Federal Rules of Appellate Procedure.

f. Article 37.071, VERNON'S ANNOTATED CODE OF CRIMINAL PROCEDURE

TRIAL, APPELLATE, AND POST-CONVICTION HISTORY OF THE CASE

1. Thomas A. Barefoot was convicted of capital murder in the 27th Judicial District of Bell County, Texas and sentenced to death on November 21, 1978.

2. The judgment of conviction and death sentence were affirmed by the Court of Criminal Appeals of Texas on March 12, 1980. Petitioner's Motion for Rehearing was denied April 30, 1980. *Barefoot* v. *State*, 596 S.W.2d 875.

3. This Court denied a petition for writ of certiorari June 29, 1981 *Barefoot* v. *Texas*, ____ U.S. ____ (No. 80-5320).

4. An application for writ of habeas corpus was filed in the state court on September 29, 1981 and was denied by the Texas Court of Criminal Appeals on October 7, 1981.

5. On October 9, 1981, an application for writ of habeas corpus was filed in the United States District Court for the Western District of Texas, Waco Division, and that court granted a stay of execution pending consideration of the application.

6. The district court conducted an evidentiary hearing on July 28, 1982, and on November 12, 1982, filed findings of fact and conclusions of law, denying habeas relief. Petitioner filed his notice of appeal on November 24, 1982. The district court granted petitioner's motion for leave to proceed in *forma pauperis* and on December 3, 1982, issued a certificate of probable cause. The stay of execution was vacated on December 8, 1982.

7. On December 20, 1982, the state trial court ordered that petitioner be executed before sunrise on January 25, 1983. Petitioner's Plea to the Jurisdiction based upon the appeal then pending in the court of appeals was denied.

8. A Motion for Stay of Execution was filed in the Court of Criminal Appeals on December 20, 1982. This Motion was denied by the Court on December 21, 1982, but petitioner was not notified of this action until January 7, 1983.

9. On January 14, 1983, a Motion for Stay of Execution was filed in the United States Court of Appeals for the Fifth Circuit. This Motion was summarily denied on January 20, 1983.

10. A Motion for Stay of Execution was filed in this Court on January 21, 1983. The Court treated the Motion as a petition for writ of certiorari, granted certiorari and stayed petitioner's execution pending judgment of the Court.

STATEMENT OF THE CASE

1. The Offense.

Petitioner was convicted of capital murder and sentenced to death for the shooting of Carl Levin, a patrolman for the City of Harker Heights, Texas, on August 7, 1978.

At the guilt stage of the trial the state presented the testimony of six witnesses from New Mexico, regarding petitioner's arrest in Valencia County, New Mexico, on October 29, 1977, for the offenses of criminal sexual penetration of a minor in the first degree and kidnapping, and his escape from the Valencia County jail on January 19, 1978. (R.1113-1142).

On the morning of August 7, 1978, PFC Edwards was driving to Fort Hood when he saw flames coming from the roof of the Silver Spur Club (R.1168-1170). He saw a man near the edge of the Club parking lot who was looking in the direction of the fire. This man ran across the highway (R.1170-1174). Edwards reported the fire and the presence of the man to the Harker Heights police dispatcher. As he was returning to the fire, Edwards again saw the same man. He reported this to officers Carl Levin and Chuck Cox who were at the fire when he got back. He observed what looked like a burning plastic milk jug on the roof of the club (R.1182-1193).

Levin, dressed in a Harker Heights police uniform departed in a marked Harker Heights police car (R.1194-1195).

Edwards identified the petitioner as the man he saw at the scene of the fire on August 7, 1978 (R.1203, 1215-1216).

Michael Thrash, another Fort Hood soldier, was walking to work at 5:35 a.m. on August 7th, when he saw a car with emergency flashers and a spotlight parked at an intersection (R.1219-1231). Thrash saw a man walk from the bushes and up to the police car (R.1228-1231). This man had a conversation with a police officer and then the man took a step forward. There was a shot and Thrash saw fire come from the barrel of a gun (R.1241). The policeman fell to the ground and the man ran away. Thrash obtained assistance after attempting to chase

the man who fired the shot (R.1243-1244). He could not identify the man who did the shooting.

Mary Richards who lived half of a block from the scene of the shooting heard two shots about 5:45 a.m. on August 7, 1978. She looked out and saw a man running down the street. He was big built, kind of muscle bound at the top and slimmed at the waist. He had auburn hair, wavy in the back. He was about five feet five or seven inches tall. The petitioner resembled the man "from the hair and the side." She could not make a positive identification, but petitioner resembled the man she saw running down the street (R.1262-1279).

Donnie Ray Tiller, a cab driver who lived in a trailer with Robert Roberson, Radene Goodlow and Deborah Forbes, in Killeen, Texas, testified that the petitioner, known to the witness as "Darren Callier," began living in the trailer in June, 1978 (R.1396-1404, 1407-1409).

On August 6th, the petitioner told Tiller of a plan to burn or blow up a building to create a diversion while he was robbing the Oasis Club (R.1415-1418). The last time Tiller saw petitioner was about 4:30 p.m. on August 6th (R.1419-1422).

The next morning petitioner called Tiller at work and asked him if he had been listening to the news. When Tiller said that he had, petitioner stated: "Yeah, I shot him. I killed the mother fucker, I shot him in the head . . ." (R.1423-1429).

Another habitue of the trailer, Robert Roberson, testified that at about 4:30 a.m. on August 7th, he drove petitioner to Harker Heights. Petitioner had what appeared to be a small automatic pistol, a home-made bomb and a plastic milk jug. Petitioner said he was going to blow up the Silver Spur Club because Joe told him to do it for the insurance (R.1516-1521, 1527, 1576-1577). Petitioner was driven by Roberson to a convenience store where he bought gas. Roberson left him at another convenience store in Harker Heights and returned to the trailer. Petitioner left the bomb in the car and Roberson disposed of it that afternoon (R.1539, 1575).

Later that morning Roberson was awakened by petitioner who had red splotches on his t-shirt and face. Petitioner said he had "wasted a cop." He changed clothes and left the trailer on foot (R.1532-1538, 1581-1582).

That same morning Francisco Hernandez met petitioner on a street in Killeen and after a brief conversation they went to a grocery store where petitioner bought groceries and then to Hernandez's apartment, where petitioner spent the night (R.1601-1605, 1629-1630).

Hernandez heard a news broadcast on the morning of August 8, which indicated that the police were looking for petitioner. Petitioner admitted that he was the man they were looking for, but he denied that he killed a policeman (R.1606-1614).

Petitioner shaved his mustache and Hernandez gave him a different shirt. They went to Belton where petitioner bought a bus ticket to Houston and Hernandez hitch-hiked to Austin (R.1615-1624, 1635-1637).

Petitioner was arrested when he got off the bus in Houston. The gun that fired the fatal bullet was in his back pocket (R.1676).

2. Evidence at the punishment hearing.

John E. Green, first assistant United States Attorney for the Western District of Oklahoma, in Oklahoma City, handled a case on October 22, 1975, in which petitioner was convicted of the unlawful possession of a sawed-off .410 gauge shotgun, and sentenced to confinement in the federal penitentiary for one year. Petitioner's objection to this evidence, because it did not involve an act of violence, was overruled (R.1663-1666).

Byron Legendre, an assistant district attorney for the Fifteenth Judicial District Court in Lafayette Parish, Louisiana, was the prosecutor in a case where petitioner entered a plea of guilty to two felony counts, distribution of marijuana and possession of amphetamine, on December 2, 1974 (R.1968-1970).

Legendre was present in court on November 26, 1974, when petitioner pled guilty to the misdemeanor offense of possessing marijuana and the offense of carrying a concealed weapon (R.1669-1670).

John Clausen was a police officer in Morgan City, Louisiana, in 1969. At that time he knew the petitioner's general reputation for being a peaceful and law abiding citizen in Morgan City was bad (R.1975-1976).

Louis Belaire was a deputy sheriff in New Iberia, Louisiana, in 1972. At that time, in Iberia Parish, petitioner's reputation for being a peaceful and law abiding citizen was bad (R.1978-1979).

Lieutenant Danny Brown of the Louisiana State Police stationed in Lafayette, Louisiana, asserted that petitioner's reputation was bad in that area in 1973 (R.1980-1983).

Carl Primeaux, probation parole officer for the Louisiana Department of Corrections, broadened the area of petitioner's bad reputation to include both Lafayette and New Iberia, Louisiana, during 1973 to 1975 (R.1984-1986).

Chester Childs, a police officer from Oklahoma City, Oklahoma, testified that petitioner's reputation for being a peaceful and law abiding citizen in Oklahoma City in 1975 was bad (R.1988-1991).

Dorece Green, Executive Director of Permian Place, testified to the same reputation for petitioner in Ector County, Texas, in 1976 (R.1991-1994).

Sheriff A. C. Gaston, from Woodward, Oklahoma, gave identical reputation testimony for the year 1977 (R.1995-1997).

Bob Olive, assistant chief of police in Neodesha, Kansas, gave like answers for petitioner's reputation in his area in 1977 (R.2001-2004).

Thomas Esquibel, district attorney for Sandeval and Valencia Counties, New Mexico, testified that petitioner's reputation in those counties was bad in 1977 and 1978 (R.2004-2007).

James Trost, a clinical psychologist for the New Mexico Health and Environmental Department, in Santa Fe, New Mexico, was in Valencia County on December 6, 1977, in response to a court order to conduct an investigation. He had some "familiarity" with petitioner's reputation for being a peaceful and law abiding citizen and that reputation was bad (R.2008-2009).

Psychiatrists John Holbrook and James Grigson, in answer to what were purportedly hypothetical questions, testified extensively in opposition to the jury's consideration of a life sentence and in support of an affirmative answer to the "future dangerousness" issue.

3. Evidentiary Hearing in the District Court

Following a plenary hearing of the writ, the district court made findings of fact and conclusions of law that were virtually verbatim to those submitted by respondent. The court's findings of fact were not supported by, but were instead contrary to, the evidence adduced at the hearing. The hearing transcript is hereafter referred to by page numbers preceeded by "T."

The court found that petitioner's complaints about the purported hypothetical question propounded to state psychiatrists Grigson and Holbrook were without merit because all of the experts who testified at the habeas hearing agreed not only with the diagnosis that petitioner was a sociopath, but they also unanimously agreed and were 90% sure that he would commit future acts of violence and thus constitute a danger to society. Such findings were unsupported by the evidence.

Psychiatrist Fred Fason disagreed that future dangerousness can be predicted with certainty without extensive examinations (T. 20). He noted that "bad reputation" had no diagnostic significance (T. 23). Although his first impression might be that petitioner was a sociopath, he would perform extensive tests to rule out paranoid personality, schizophrenia, passive-aggressive personality and chromosome disorder, among

others (T. 39). Fason did not agree that the hypothetical question contained sufficient data upon which to make a diagnosis and that a medical practioner doing so would be incompetent, certainly where a man's life is at stake (T. 37).

Psychologist Wendell Dickerson pointed out the high error rate in predicting future dangerousness, two out of three predictions being wrong, saying "clinicans do significantly overpredict" (T. 97-98). In his opinion, psychiatric diagnosis does not accurately predict behavior and future conduct with a high degree of accuracy (T. 105). Dickerson declined to diagnose petitioner's mental condition from the hypothetical *data*, but treating the information as a medical school exercise, his first guess would be that he was sociopathic (T. 116).

Respondent's psychologist, Dr. George Parker, did agree with Grigson's analysis of the hypothetical *data*, although even he conceded that he was not 100% sure of anything (T. 190). He knew of no scientific studies of sociopaths that confirmed the accuracy of predictions of future dangerousness (T. 200). Listing seven or eight factors he would consider in diagnosing a sociopath, Parker claimed that *he needed only to know that petitioner committed murder and had the criminal history listed in the hypothetical question, to make his diagnosis* (T. 212).

Parker agreed with petitioner that a jury might be misled by an expert's prediction of future dangerousness with 100% certainty, and that the defendant on trial is an untreatable sociopath, and a danger in the penitentiary, if sentenced to life (T. 217, 220). He agreed that this information would mislead any jury naive as to believe that anything is 100% accurately predictable (T. 221).

Respondent's psychiatrist, Richard Coons, believed that adequate data was presented in the hypothetical questions for a reliable expert opinion that petitioner was a sociopath, but agreed that with more information, the diagnosis could be confirmed (T. 231, 242). He said [contrary to Grigson's assertion] that sociopathic behavior declines after the age of 40 (T. 244).

SUMMARY OF THE ARGUMENT

Where a federal district court, although denying a petition for writ of habeas corpus by a person in state custody, issues a certificate of probable cause and grants leave for the petitioner to appeal in forma pauperis, the court of appeals must accord him the same procedural rights as any other appellant. *Coopedge* v. *United States*, 369 U.S. 438 (1962). This includes the right to a disposition of the appeal in accord with the circuit court's ordinary procedure. *Nowakowski* v. *Maroney*, 386 U.S. 542, 543 (1967).

Summary treatment of a habeas appeal by the court of appeals is authorized if that court's order affirmatively shows that the appeal was duly considered on its merits and that, despite the issuance of the certificate of probable cause, the appeal is *frivolous*. *Carafas* v. *LaVallee*, 391 U.S. 234, 242 (1968).

"Where an appeal possesses sufficient merit to warrant a certificate, the appellant must be afforded adequate opportunity to address the merits, and . . . if a summary procedure is adopted the appellant must be informed, by rule or otherwise, that his opportunity will or may be limited." *Garrison* v. *Patterson*, 391 U.S. 464, 466-467 (1968).

The general rules applicable to consideration of a habeas appellant's motion to stay the execution of his death sentence are: (1) once the district court grants a certificate of probable cause, the appellant has an absolute right to appeal the final order of that court. A review on the merits is required; (2) review is mandated where the petitioner's application for habeas relief is his first assertion of most of his constitutional arguments in federal court, and the issues raised are not frivolous; (3) even though state-court findings properly made are presumptively correct, the court of appeals is required to consider every legal challenge made pursuant to federal constitutional law; and (4) when a responsible review of the district court proceedings cannot be made and the merits cannot be satisfactorily considered prior to execution of a scheduled

death sentence, a stay should be granted. *Foquette* v. *Bernard*, 198 F.2d 96 (9th Cir. 1952): *United States ex rel. Goins* v. *Sigler*, 250 F.2d 128 (5th Cir. 1957); *Shaw* v. *Martin*, 613 F.2d 487 (4th Cir. 1980); *Dobbert* v. *Strickland*, 670 F.2d 938 (11th Cir. 1982).

The standards imposed by the Court of Appeals for the Fifth Circuit in the instant case disregarded the above authorities under the guise of its authority under Rule 8, Fed. R. App. P. to disregard the requirements of 28 U.S.C. Sections 1915(a), 2251, 2253, and Rule 22(b), Fed. R. App. P.

Instead of subjecting the issues raised by petitioner to either the "frivolous" or "substantial showing of the denial of a federal right" test, the Court required a threshold showing of the "likelihood of success" used in stays of civil injunctions and judgments.

None of the prior cases from the Court informed petitioner that the proceedings on his stay application would also involve consideration of the entire case on the merits. The cases cited by the Court of Appeals to support the stringent standards here imposed specifically hold that the stay application will be considered without regard to the merits of the case.

There is no Local Rule by the Fifth Circuit authorizing such summary treatment or serving as notice to habeas petitioners that such may be their fate.

The issues raised by petitioner are substantial. They are supported by a growing authority from the psychiatric community, and by the American Psychiatric Association, whose counsel authorized petitioner to inform the circuit court that the Association would file an *amicus curiae* brief in this cause.

There is also respected legal authority supporting petitioner's claims. *White* v. *Estelle*, ____ F. Supp. ____, [No. H-81-1661] (S.D.Tx. decided December 30, 1982). See *People* v. *Murtishaw*, 631 P.2d 446 (Sup.Ca. 1982).

ARGUMENT

1. Standards Of Summary Appellate Review On Habeas Corpus Motion To Stay Execution Of Death Sentence.,

The United States District Court, after an evidentiary hearing and examination of the trial record denied habeas relief to the petitioner, a state prisoner who was scheduled to be executed before sunrise on January 25, 1983, dissolved a previously granted stay of execution, granted leave to proceed in *forma pauperis*, and issued a certificate of probable cause.

Petitioner filed a motion for stay of execution in the Court of Appeals on Friday, January 14, 1983. At approximately 3:00 p.m. on Monday, January 17, the Court scheduled oral argument on the application for Wednesday, January 19, at 9:00 a.m. Counsel was "requested to present argument on questions raised if the Court of Appeals refused to stay execution, when the consequence in death during the pendency of an appeal in process. See *Brooks* v. *Estelle*, 51 Law Week 3469 (December 6, 1982). [Counsel was] also permitted to present any matter considered germane to the grant or denial of a stay and the consequences of that decision."

At 1:00 p.m. on Thursday, January 20, the Court of Appeals issued a 16-page opinion denying a stay of execution.

The test under which the Court of Appeals gauged the Application was a consideration of the "likelihood of success of [the] appeal" and the requirement that "[t]here should be a substantial case on the merits of any serious legal question involved in the appeal to warrant staying the decision below," citing *Ruiz* v. *Estelle*, 666 F.2d 854, 857 (5th Cir. 1982).

The impediments raised by the certificate of probable cause were brushed aside under the purported authority of Rule 8, Fed. R. App. P., which "clearly contemplates that it is the appellate court's responsibility to decide the merits of [a stay of execution of a death sentence in the appeal from an adverse habeas corpus proceeding in the district court]."

A review of the authorities exposes the fallacy of this conclusion.

Coopedge v. *United States*, 369 U.S. 438 (1962), established the standards to be applied by the lower federal courts in ruling on motions to appeal in *forma pauperis*. The "good faith" requirement of 28 U.S.C. Sec. 1915(a) is met when "it is apparent that the applicant will present issues for review not clearly frivolous." 369 U.S. at 446.

While *Coopedge* specifically addressed the statutory right of an indigent federal defendant to appeal his conviction, it also articulated the proposition that the Courts of Appeals must accord all putative appellants "the same procedural rights."

Only if the Court of Appeals screened the paid appeals on its docket for frivolity, without hearing oral argument, reviewing a record of the trial proceedings or considering full briefs, could it impose the same rules in indigent cases.

"But, if [it was the Court's practice] to defer rulings on motions to dismiss paid appeals until the court has had the benefit of hearing argument and considering briefs and an adequate record, we hold it must no less accord the poor person the same procedural rights." *Coopedge* v. *United States*, Id. at 447-448; *Ellis* v. *United States*, 356 U.S. 674, 675, (1958).

Determination by either the district or circuit court that a habeas petitioner may appeal in *forma pauperis* does not assure his right to an appeal. He must also obtain a certificate of probable cause as required by 28 U.S.C., Sec. 2253. The procedure is governed by Rule 22(b), Fed. R. App. P., which provides that "the district judge who rendered the judgment shall either issue a certificate of probable cause or state the reasons why such a certificate should not issue. The certificate or the statement shall be forwarded to the court of appeals with the notice of appeal and the file of the proceedings in the district court. If the district judge has denied the certificate, the applicant for the writ may then request issuance of the certificate by a circuit judge."

In *Nowakowski* v. *Maroney*, 386 U.S. 542, 543 (1967), this Court held that the Court of Appeals erred in summarily denying a habeas petitioner's application to proceed in forma

pauperis after the district judge has issued a certificate of probable cause pursuant to U.S.C. Sec. 2253, saying that "when a district judge grants [a certificate of probable cause], the court of appeals must grant an appeal in *forma pauperis* (assuming the requisite showing of poverty) and proceed to a disposition of the appeal in accord with its ordinary procedure."

In *Stewart* v. *Beto*, 454 F.2d 268 (5th Cir. 1971), *cert. denied*, 406 U.S. 925 (1972), the court refused to rule on an application for a certificate of probable cause in the first instance, where there had been no ruling by the district judge, concluding that the operation of U.S.C. Sec. 2253, and the procedures required by Rule 22(b), Fed. R. App. P. obliged the district judge who heard the habeas petition to act on the motion for the certificate. The appellate court has jurisdiction of the appeal if the district judge grants the certificate. If the motion is denied, the judge must state the reasons for the denial. Then the Court said, at page 269:

> "It would be proper for this court to grant the certificate under Rule 22(b). However, a denial of the certificate by this court would foreclose appellant from his first level right to a ruling by the district judge.
>
> "This right is one of substance as will be seen from the fact that Congress has vested absolute power in the district courts to allow habeas appeals by granting the certificate in the first instance. See *Nowakowski* v. *Maroney*, 1967, 386 U.S. 542 . . . Under Sec. 2253, a district judge, in his sole discretion, may permit an appeal if probable cause to appeal is found."

See *Clements* v. *Wainwright*, 648 F.2d 979 (5th Cir. 1981), where the court again refused to rule on an application for probable cause and remanded the case for a ruling by the district judge.

The court refused to treat the district court's order granting leave to appeal in *forma pauperis* as the equivalent of a certificate of probable cause. This holding was required because "[t]he test for granting a certificate of probable cause is stricter" than that for leave to proceed in *forma pauperis*.

The court cited with approval the statement by Justice (then Judge) Blackmun that: "My own reaction is that the cases [of the several circuits], taken as a whole, do indicate that the standard of probable cause requires something more than the absence of frivolity and that the standard is a higher one than the "good faith" requirement of Sec. 1915." Blackmun, *Allowance of In Forma Pauperis Appeals in Sec. 2255 and Habeas Corpus Cases*, 8th Cir. 43 F.R.D. 343, 352 (1967). See *Payne* v. *United States*, 539 F.2d 443 (5th Cir. 1976), *cert. denied*, 429 U.S. 1103 (1977).

The Fifth Circuit has equated "probable cause" to a "substantial showing of the denial of [a] federal right." *Harris* v. *Ellis*, 204 F.2d 685, 686 (5th Cir. 1953); *Stewart* v. *Beto*, 454 F.2d at 270, n. 2; cf., *Dillingham* v. *Wainwright*, 422 F. Supp. 259 (S.D.Fla. 1976), affirmed 555 F.2d 1389 (5th Cir. 1977).

Variations of this standard have been pronounced by the several circuits. See, e.g., *Ramsey* v. *Hand*, 309 F.2d 947, 948 (10th Cir. 1962) ("substantial question"); *Bowlen* v. *Scafati*, 395 F.2d 692, 693 (1st Cir. 1968) ("possible merit"); *Garnder* v. *Pogue*, 558 F.2d 548 (9th Cir. 1977); *Poe* v. *Gladden*, 287 F.2d 249, 251 (9th Cir. 1961) ("not plainly frivolous"); *Goode* v. *Wainwright*, 670 F.2d 941 (11th Cir. 1982) (substantial issues); *Beller* v. *Clausen*, 484 F. Supp. 217 (E.D.Wis. 1980) ("substantial questions"); *Gordon* v. *Secretary of State of Wisconsin*, 462 F. Supp. 307 (E.D.Wis. 1978) ("substantial question"); see *Alexander* v. *Harris*, 595 F.2d 87, 91 (2nd Cir. 1979) and the detailed analysis of the variations used by the several circuits, and that Court's determination that probable cause is shown "if [the petition] is not frivolous and . . . presents some question deserving appellate review." See generally, Hunter, *Post Conviction Remedies*, 50 F.R.D. 153, 176 (1971); Blackmun, *Allowance Of In Forma Pauperis Appeals In Section 2255 And Habeas Corpus Cases*, 43 F.R.D. 343, 351-354 (1967).

In *Carafas* v. *LaVallee*, 391 U.S. 234 (1968), the district court dismissed a petition for writ of habeas corpus but issued a

certificate of probable cause and ordered that the notice of appeal be filed without prepayment. Notice of appeal was filed and the petitioner applied to the circuit court for leave to proceed in *forma pauperis*. The State opposed this latter motion and moved to dismiss the appeal on the ground that it was without merit.

The court of appeals denied the Application for Leave to Proceed in Forma Pauperis and granted the State's motion to dismiss the appeal. *Nowakowski* v. *Maroney*, 386 U.S. 542 (1967), was decided after the circuit court's ruling but before *Carafas* was concluded.

This Court reaffirmed the *Nowakowski* rule that "when a district judge grants . . . a certificate of probable cause, the court of appeals must grant an appeal in *forma pauperis* . . . and proceed to a disposition of the appeal in accord with its ordinary procedures." *Carafas* v. *LaValle*, 391 U.S. at 241.

The State argued that the circuit court's rulings were proper because the entire district court record was available to it and because the motion to dismiss and the petitioner's reply contained some argument on the merits.

Rejecting this argument, the Court said, at page 242:

> "Nothing in the order entered by the Court of Appeals . . . indicates that the appeal was duly considered on its merits as Nowakowski requires in cases where a certificate of probable cause has been granted. Although Nowakowski does not necessarily require that the Court of Appeals give the parties full opportunity to submit briefs and argument in an appeal which, despite the issuance of the certificate of probable cause, is *frivolous*, enough must appear to demonstrate the basis for the court's summary action. Anything less than this, as we held in Nowakowski, would negate the office of the certificate of probable cause."

In *Garrison* v. *Patterson*, 391 U.S. 464 (1968), after the district court denied a death-sentenced state prisoner's petition for writ of habeas corpus, and refused to issue a certificate of probable cause to appeal, the petitioner filed a three-page

document in the Court of Appeals, requesting a stay of execution, a certificate of probable cause to appeal, and leave to proceed in *forma pauperis*. The pleadings merely stated the chronological history of the case, and specified one of the issues alleged as requiring further hearing by the appellate court.

The next day counsel were heard orally by a panel of the Court of Appeals, and nine days later, without further argument or submissions by counsel, the Court issued an order granting the certificate of probable cause and affirming the district court's denial of habeas relief.

This Court noted that the principle underlying the holding in *Nowakowski* v. *Maroney*, *supra*, "was that if an appellant persuades an appropriate tribunal that probable cause for an appeal exists, he must then be afforded an opportunity to address the underlying merits. This principle is no less applicable when a court of appeals, having received submissions relating only to probable cause and other procedural matters, decides that probable cause indeed exists." 391 U.S. at 546.

The Court cited *Carafas* v. *LaVallee*, 391 U.S. 234, at 242, as authority for the qualification that *Nowakowski* "does not prevent the courts of appeals from adopting appropriate summary procedures for final disposition of such cases."

The Court in *Garrison* v. *Patterson*, 391 U.S. at 466-467, added the following caveat:

> "Carafas requires the courts of appeals to give sufficient indication that an appeal has been disposed of on the merits, but nothing in Nowakowski and nothing we say here prevents the courts of appeals from considering the questions of probable cause and the merits together, and nothing said there or here necessarily requires full briefing and oral argument in every instance in which a certificate is granted. *We hold only that where an appeal possesses sufficient merit to warrant a certificate, the appellant must be afforded adequate opportunity to address the merits, and that if a summary procedure is adopted the appellant must be informed, by rule or otherwise, that his opportunity will or may be [467] limited.* Within this

> general framework, the promulgation of specific procedures is a matter for the courts of appeals. [emphasis added]

Even though the respondent in *Garrison* argued that petitioner was given all the time he wanted for oral argument, the Court noted that he "was unable, however, to point to any rule or decision *forewarning* an applicant for a certificate of probable cause to make his argument on the underlying issues.

In *Fouquette* v. *Bernard*, 198 F.2d 96, 97-98 (9th Cir. 1952) where a death-sentenced state prisoner sought a stay of execution after the district court denied his petition for writ of habeas corpus and issued a certificate of probable cause, Chief Judge Denman, sitting alone, found that the record presented a substantial question for consideration on appeal. He also noted that "[o]bviously, if there is probable cause for the appeal it would be a mockery of federal justice to execute Fouquette pending its consideration."

Foquette was followed in *United States ex rel. Goins* v. *Sigler*, 250 F.2d 128, 129 (5th Cir. 1957). There the district court denied a petition for writ of habeas corpus by a death-sentenced state prisoner but granted a certificate of probable cause. The court said: "For that appeal to be effective it is obvious that it would be necessary to stay the execution of the appellant pending the appeal."

An application to stay execution of a death sentence by a state prisoner was heard and granted by Circuit Judge Phillips in *Shaw* v. *Martin*, 613 F.2d 487 (4th Cir. 1980). It does not appear that the district judge issued a certificate of probable cause before the stay application was presented to and considered by Judge Phillips.

At the outset, Judge Phillips noted, at page 490:

> "There is no developed body of precedent to guide the decision to grant or deny a stay of imminent execution of a death sentence. The wholly unique situation presents a

wholly unique problem in the administration of criminal justice.

". . .

"In the final analysis, there is required a practical judgment whether in the particular situation 'the legal issues have been sufficiently litigated and relitigated that the law must be allowed to run its course'; and whether the criminal defendant's entitlement to 'all the protections . . . which surround him under our system prior to conviction and during trial and *appellate review* [emphasis mine] have been accorded."

Judge Phillips felt that "even with respect to issues pending for first instance resolution, it may be appropriate to require a facial showing of substance to justify a stay." He concluded, however, that "the inquiry into substance properly stops with identification of the nature of the issue, and with consideration as to whether it has already been fairly litigated on the merits under procedures designed for the purpose. In the very nature of proceedings on a motion for a stay of execution, the limited record coupled with the time constraints imposed by the imminence of execution preclude any fine-tuned inquiry into the actual merits." Id. at 491-492.

The reasoning in the *Shaw* case was followed in *Dobbert* v. *Strickland*, 670 F.2d 938 (11th Cir. 1982). The motions for stays of execution in both cases were brought purusant to 28 U.S.C. Sec. 2251, and without regard to the novel concept that Rule 8, Fed. R. App. P. governed consideration of the motions.

In *Dobbert*, the district court issued a certificate of probable cause but denied a say of execution. The Court said, "Under the issuance of the certificate, the petitioner had an absolue right to appeal the final order of the district court to this Court. A review on the merits is required." Id. at 939.

The Court inferentially found that one of the issues presented by Dobbert, present in several similar habeas appeals in which the sentences of execution have been stayed, was a

substantial one, but other major considerations in granting the stay were:

> "It was apparent to the Court that a responsible review of the district court proceedings could not be accomplished prior to the scheduled time for execution of sentence. Petitioner's application for a writ of habeas corpus is his first assertion of most of his constitutional arguments in federal court. Although state-court findings properly made are presumed correct by the federal court in a section 2254 action . . . this Court is required to consider every legal challenge made pursuant to federal constitutional law. *Napue* v. *Illinois*, 360 U.S. 264 (1959).
>
> ". . .
>
> "When the merits cannot be satisfactorily considered prior to execution of a scheduled death sentence, as in this instance, a stay should be granted.

Dobbert and *Goode*, as well as Judge Phillips' ruling in *Shaw* all demonstrate a grasp of the standards approved by this Court for use by the lower federal courts in considering motions to stay execution of a scheduled death sentence. Each recognized that (1) once the district court grants a certificate of probable cause, a habeas petitioner has an absolute right to appeal the final order of that court. A review on the merits is required; (2) review is mandated where the petitioner's application for a writ of habeas corpus is his first assertion of most of his constitutional arguments in federal court, and the issues raised are not frivolous; (3) even though state-court findings properly made are presumptively correct, the court of appeals is required to consider every legal challenge made pursuant to federal constitutional law; and (4) when a responsible review of the district court proceedings cannot be made and the merits cannot be satisfactorily considered prior to execution of a scheduled death sentence, a stay should be granted.

The scholarly analysis by Judge Murphy of a district judge's duty in considering issuance of a certificate of probable cause after denying habeas relief to a person in state custody, in *Gordon* v. *Willis*, 516 F. Supp. 911 (N.D.Ga. 1980), lucidly sets out standards that are equally appropriate for consideration by

the court of appeal in ruling on the same petitioner's application to stay the execution of his death sentence.

First, doubts about whether to grant the certificate should be resolved in favor of the petitioner. *Jones* v. *Warden, Louisiana State Penitentiary*, 402 F.2d 776 (5th Cir. 1968).

Second, the Congressional purpose in enacting Section 2253 was to "eliminate the abuse of the writ of habeas corpus in the federal courts by undue interference with state processes incident to protracted appellate proceedings in *frivolous* cases. *United States ex rel. Winfield* v. *Cascles*, 403 F. Supp. 956 (E.D.N.Y. 1975).

Third, "Even a 'weak' argument, one which may be 'well beyond the law's existing frontier but well within the frontier of rationality' is properly certified.

Fourth, "if there was considerable law supporting petitioner's argument, but stronger authority for the position of the respondent, then the certificate should be granted."

Fifth, "In requiring a 'question of some substance', or a 'substantial showing of the denial of [a] federal right', obviously the petitioner need not show that he should prevail on the merits. He has already failed in that endeavor. Rather, he must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues other than how this Court has; or that the questions are 'adequate to deserve encouragement to proceed further.' " *United States ex rel. Jones* v. *Richmond*, 245 F.2d 234 (2nd Cir. 1957), *cert. denied*, 355 U.S. 846 (1957).

The following additional principles may be gleaned from the authorities cited above:

1. The Courts of Appeals must accord all putative appellants "the same procedural rights." *Coopedge* v. *United States*, 396 U.S. 438 (1962);

2. When a district judge grants a certificate of probable cause to appeal, the court of appeals must grant an appeal in

forma pauperis (assuming the requisite showing of poverty) and proceed to a disposition of the appeal in accord with its ordinary procedure. *Nowakowski* v. *Maroney*, 386 U.S. 542 (1967);

3. The right to a ruling by the district judge on the motion for certificate of probable cause is one of substance "as will be seen from the fact that Congress has vested absolute power in the district courts to allow habeas appeals by granting the certificate in the first instance." *Stewart* v. *Beto*, 454 F.2d 268 (5th Cir. 1971).

4. Any summary dismissal order by the court of appeals after the district judge has granted a certificate of probable cause must affirmatively show that the appeal was considered on its merits as required by *Nowakowski*, *Carafas* v. *LaVallee*, 391 U.S. 234 (1968).

5. Even though a certificate of probable cause has been issued, *Nowakowski* does not require full briefing and argument if the appeal if *frivolous*, but enough must appear to demonstrate the basis for the court's summary action. Ibid.

6. *Nowakowski* does not prevent the courts of appeals from adopting appropriate summary procedures for final disposition of appeals which, despite the issuance of the certificate of probable cause, are *frivolous*, but the petitioner must be given an opportunity to address the merits, and he must be informed, by rule or otherwise if summary procedures are to be used. *Garrison* v. *Patterson*, supra.

2. Standards Of Review Imposed In The Fifth Circuit.

The Court of Appeals for the Fifth Circuit has recently considered two other Texas death penalty cases in which the petitioner sought a stay of execution of his death sentence.

In *O'Bryan* v. *Estelle*, 691 F.2d 706 (5th Cir. 1982), the district court denied habeas relief, refused to stay the petitioner's execution and rejected his motion for a certificate of probable cause.

His application to the Court of Appeals for a stay of execution and certificate of probable cause were granted, but the Court applied the stringent rules applicable to non-habeas civil stays of exeuction of judgment and stays of injunctions pending appeal.

They considered (1) whether the movant has made a showing of likelihood of success on the merits, (2) whether the movant has made a showing of irreparable injury if the stay is not granted, (3) whether the granting of the stay would serve the public interest."

These rigid standards were tempered by a habeas petitioner's right of appeal as stated in *Goode* v. *Wainwright*, 670 F.2d 941 (11th Cir. 1982): "A defendant 'is given the right to seek review in the federal courts of claims based upon our national Constitution and arising from his State court conviction. If he is denied relief in the federal district court then the law gives him the right to appeal.' " *O'Bryan* v. *Estelle*, 691 F.2d at 708.

After thus departing from the previous standards imposed by statute and rule governing the appeal of habeas cases, the court specifically found "that at least one of Petitioner's claims presents a substantial question and because we cannot possibly give adequate review to his claims in the few days remaining before his scheduled execution, we must grant the stay in order to protect the Petitioner's right to appeal the district court's denial of habeas corpus relief." Id. at 708.

It is not clear from the opinion whether or not the Court based the stay upon the "substantial question" standard.

While the "non-frivolous" standard imposed upon a *forma pauperis* appeal may, in practical effect, be equated with the "substantial federal issue" standard necessary for a certificate of probable cause, neither of these concepts is equivalent to a showing of a "likelihood of success on the merits."

The second case was *Brooks* v. *Estelle*, ____ F.2d ____, [Slip Opinion, Cause No. 82-1613] (5th Cir. 1982), where the court, without citing or referring to *O'Bryan*, denied a stay of execu-

tion on the ground that "there was no substantial question concerning the correctness of the district court's judgment." Slip Op. p. 3.

The Court also refused to stay Brooks' execution, the majority relying upon the opinion by the Court of Appeals that there were no remaining arguments or contentions of substance that would benefit from further briefing and oral argument, ie., essentially that the issues were both frivolous and had been previously presented to and denied by the court. *Brooks* v. *Estelle*, ___ U.S. ___, [No. A-504] (1982). Summary action was appropriate under those circumstances even though the district court has issued a certificate of probable cause.

The court of appeals affirmatively demonstrated that Brooks' claims had been considered on the merits, that none of them presented a substantial issue, and, by inference, were frivolous.

The due process standards inherent in *Coopedge* and *Garrison* were apparently disregarded in *Brooks*. The petitioner was not accorded "the same procedural rights," including the statutory right of appeal, given all putative appellants. The court of appeals had not previously established, by rule or otherwise, that a petitioner's opportunity to address the merits of his appeal would be limited and would receive summary treatment.

The only fifth circuit authority at the time the *Brooks* motion for stay was summarily denied was *O'Bryan* v. *Estelle*, supra, and there the court granted a certificate of probable cause and a stay of execution and set the case for accelerated review on the merits.

At no time prior to the *O'Bryan* decision had the court ever indicated that the standards of Rule 8, Fed. R. App. P. would apply to the summary review of a motion to stay the execution of a death sentence. It is doubtful that those standards were used in *O'Bryan*, it appearing that the court's decision was based upon the "substantial issue" rule alone.

In the instant case, the court of appeals, in an effort to meet the minimum due process requirements of *Garrison*, held that the rigid *O'Bryan* standards were authorized by Rule 8, Fed. R. App. P., neatly overruling the district court's primary authority to grant an appeal in habeas cases and ignoring the rulings of this Court that such summary treatment is restricted to *frivolous* appeals.

Thus, at the time the court of appeals denied the motion to stay the execution of the death sentence in this case, after the district court granted a certificate of probable cause, the petitioner had no prior notice, by rule or otherwise, that his stay motion would be judged under the provisions of Rule 8, or that, in the summary procedure adopted by the court of appeals in his case, his opportunity to address the merits of his appeal would be limited.

Even if it be conceded, *arguendo*, that the Rule 8 standards are applicable to habeas review, the court of appeals had no opportunity to adequately review the merits in this cause.

This is not an eleventh-hour motion for stay by design. A fourteen day delay in presenting the stay application was occasioned by the failure of the Court of Criminal Appeals to notify petitioner that his first motion for stay of execution had been summarily denied by that court.

The application was filed in the court of appeals on Friday, January 14, 1983. At approximately 3:00 p.m. on Monday, January 17, the court scheduled oral argument on the application for 9:00 a.m. on Wednesday, January 19. Nothing in the court's notification informed the petitioner that the court was contemplating summary review of the merits of his appeal. Consequently petitioner was never afforded an opportunity to brief and address the merits except as they bore upon the stay proceeding. In addition, the severe time limitations effectively eliminated any possibility of such detailed submission by the petitioner, and the proceedings effectively denied petitioner any meaningful appeal on the merits.

Just as in *O'Bryan*, the court of appeals stated that "[u]pon the question of whether to stay an execution until the appeal has been processed, we consider the likelihood of success of that appeal." The court again cited *Ruiz* v. *Estelle*, 650 F.2d 555 (5th Cir. 1982) as authority. *Barefoot* v. *Estelle*, ___ F.2d ___, Slip Op. p. 2318. (5th Cir. 1983).

In *Ruiz*, the issue before the court was the motion of the respondent-appellant, director of the department of corrections to stay portions of the district court's injunction against certain practices and conditions existing in the Texas corrections system.

The court specifically noted that under Rule 8, "we do not decide the merits of the State's appeal from the lower court's injunction; intead, we consider only whether the district court's injunction should be stayed pending appeal." *Ruiz* v. *Estelle*, 650 F.2d at 565.

Obviously there is no statutory authority for a district court, in granting an injunction, to authorize an appeal on the merits.

All of the cases cited in *Ruiz* emphasize that the court will not decide the merits of the appeal; that the only issue before the court was whether the district court's judgment or injunction should be stayed pending appeal. There is thus nothing in *Ruiz* or the cases upon which it is based to put petitioner on notice that the merits of his appeal would be reached on the stay proceedings.

The test imposed by the court of appeals under Rule 8 and in violation of 28 U.S.C. Sec. 2251, requiring petitioner to show a likelihood of success of the appeal, goes far beyind the nonfrivolous standard imposed by this Court in habeas appeals where a certificate has been granted by the district court.

It was physically impossible for the members of the panel below to have made any "fine-tuned inquiry into the actual merits" of petitioner's case. No panelist had ever seen the 260 page habeas record and the 1400 page trial record until after oral arguments had been concluded. No substantive evaluation

of petitioner's claims was possible "under the time constraints imposed by the imminence of [petitioner's execution]."

The court below has extended its recent decisions in *Brooks* v. *Estelle*, supra, and *O'Bryan* v. *Estelle*, supra, to hold that constitutional issues of first impression which are manifestly not frivolous may nonetheless be summarily rejected, without prior notice by rule, decision or order, upon an application to stay the execution of a death sentence.

The Court erroneously utilized Rule 8, Fed. R. App. P., to circumvent the statutory provisions of 28 U.S.C. Section 2251.

Petitioner contended that the "hypothetical" testimony of Grigson and Holbrook predicting his absolutely certain, 100% future dangerousness, even to the inmates and personnel of the Texas Department of Corrections if given a life sentence, based solely upon a "hypothetical" question, violated his Sixth, Eighth and Fourteenth Amendments rights.

An abundance of legal and psychiatric literature, summarized for this Court by the American Psychiatric Association in Point I of its *amicus* brief filed in *Estelle* v. *Smith*, (No. 79-1127) support petitioner's position. A copy of that point of the *amicus* brief was annexed as appendix B to petitioner's original motion for stay of execution before this Court. The American Psychiatric Association itself supports that position, as both the *Smith amicus* brief and the Draft Report of the Association's Task Force on the Role of Psychiatry in the Sentencing Process (Exhibit G to petitioner's stay application below). Counsel for the Association authorized petitioner to inform the court below that the Association intended to file an *amicus curiae* brief on petitioner's appeal.

There are recent legal opinions supporting petitioner's position, specifically *People* v. *Murtishaw*, 631 P.2d 446 (Sup. Ca. 1982); and *White* v. *Estelle*, ___ F.Supp ___ [No. H-81-1661] (S.D.Tx. 1982). The respondent argued in *White* that he should be granted a new trial because that decision was in conflict with the ruling in *Barefoot* v. *Estelle*.

The authorities and principles detailed in part two of this brief, are sufficient to show that petitioner's claim was not frivolous. It involved substantial issues going to the very heart of the Texas punishment procedure. Any doubts on this score should be resolved in the petitioner's favor. *Gordon* v. *Willis*, supra.

The issues raised by petitioner were substantial. Another federal district court had just reached a contrary result in a similar case relating to the unreliability of hypothetical psychiatric testimony at the punishment phase of a capital trial. *White* v. *Estelle*, supra; *Goode* v. *Wainwright*, supra; *Dobbert* v. *Strickland*, supra.

Even if petitioner's claim was "weak" and "well beyond the law's existing frontier" it was "well within the frontier of rationality" and thus justified in-depth consideration. Every case of first impression begins in just such a posture.

Even if there is law supporting petitioner's position, but stronger authority for respondent's position, a substantial issue is raised, the appeal is not frivolous and the indigent petitioner is entitled to the same procedural rights available to other appellants. *Coopedge* v. *United States*, supra; *Gordon* v. *Willis*, supra.

The procedures followed by the 11th Circuit, along with the considerations detailed by Judge Murphy in *Gordon* v. *Willis*, are appropriate, reasonable and just to both parties. Anything less deprives a death-sentenced habeas petitioner of all semblance of due process and equal protection of the law.

SUMMARY OF ARGUMENT ON THE HYPOTHETICAL QUESTION

Expert psychiatric predictions of future dangerousness are unreliable and prejudicial to a capital defendant. A hypothetical opinion not based on facts within the area of expertise of the witness is inadmissible and incompetent evidence. The "hypothetical" person was indistinguishable from Thomas A. Barefoot. An outrageous diagnosis made, without medical

evaluation or personal or familial history of Barefoot, that he was a sociopath of the most severe type, was untreatable, and would 100% certainly and absolutely commit future acts of violence that would constitute a continuing threat to society, was devastating to efforts to be sentenced to life rather than death.

Texas is the only state of the thirty-seven authorizing the death penalty that fails to specifically require the sentencing authority to weigh aggravating against mitigating circumstances in determining punishment. The absence of guidance in considering any factors warranting leniency, coupled with medical experts asserting that the "hypothetical" defendant on trial is without question dangerous and will kill many others unless executed, goes to the very heart of the discretionary sentencing process. There is no room in the criminal sociopath category for considering any facts in mitigation. What matters the age of the defendant, whether he acted under the influence of intoxicating substances, the domination of another, extreme mental or emotional duress or believed in some justification for his conduct? Even if these facts be true, an expert opinion that his anti-social condition is untreatable and he is without doubt a future danger to all other humans, misleads a jury into believing he must die.

The sentencing process of a capital trial must satisfy requirements of the Due Process Clause. A constitutional death penalty must serve both goals of measured, consistent application and fairness to the accused. The sentencing hearing for Barefoot failed to satisfy Due Process, deprived him of effective assistance of his counsel, and removed all discretion from the jury violating the Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution requiring Barefoot's death sentence be vacated.

The Hypothetical Question

Central to the Texas capital sentencing procedure is the second of the two special issues normally submitted to the jury at the separate punishment phase of the trial. The jury must

determine beyond a reasonable doubt "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." Article 37.071, Vernon's Ann.Code of Criminal Procedure.

This Court upheld the validity of the Texas capital punishment scheme in *Jurek* v. *Texas*, 428 U.S. 262 (1976), citing with approval the following language from *Jurek* v. *State*, 522 S.W.2d 934, 940 (Tex.Cr.App. 1975):

> "In determining the likelihood that the defendant would be a continuing threat to society, the jury could consider whether the defendant had a significant criminal record. It could consider the range and severity of his prior criminal conduct. It could further look to the age of the defendant and whether or not at the time of the commission of the offense he was acting under duress or under the domination of another. It could also consider whether the defendant was under an extreme form of mental or emotional pressure, something less, perhaps than insanity, but more than the emotions of the average man, however inflamed, could withstand." 428 U.S. at 272-273.

Although any matter deemed relevant to sentencing by the individual trial judges is admissible, the Texas courts do not instruct the jury to consider any mitigating circumstances or to weigh the mitigating evidence against the aggravating factors in determining its answers to the punishment issues.

Psychiatric testimony has been deemed relevant to sentencing by the Texas courts, and it has been used primarily by the State to support affirmative answers to the future dangerousness issue. See, eg., *Granviel* v. *State*, 552 S.W.2d 107 (Tex.Cr.App. 1976), *cert. denied*, 431 U.S. 933 (1977); *Granviel* v. *Estelle*, 655 F.2d 673 (5th Cir. 1981), reversed on other grounds.

The first limitation placed upon such testimony was imposed by this Court in *Estelle* v. *Smith*, 451 U.S. 454 (1981), where the Court curbed the use of psychiatric testimony obtained by the State's expert witnesses, often the same two psychiatrists involved in both *Smith* and this case, obtained in violation of a defendant's Fifth and Sixth Amendment rights. Since that

time, the Court of Criminal Appeals of Texas has rejected psychiatric testimony, again by Grigson, that was not based on sufficient relevant facts within the personal knowledge of the psychiatrist or assumed from common or judicial knowledge or established by evidence, holding that such "opinion is without value and is inadmissible, if based upon facts and circumstances gleaned by [the witness] from ex-parte statements of third persons, and not established by legal evidence before a jury trying the ultimate issue to which the opinion relates." *Holloway* v. *State*, 613 S.W.2d 497 (Tex.Cr.App. 1981), citing *Reed* v. *Barlow*, 157 S.W.2d 933 (Tex.Civ.App. San Antonio, 1941) *writ ref'd.*

A. The Dangerousness Issue In Other Jurisdictions

Of the thirty-seven states that authorize the death penalty, only five—Texas, Virginia, Oklahoma, Idaho and Washington—include the prediction of future dangerousness as a factor to be considered by the sentencer.

The Maryland statute has, as a mitigating circumstance, the *unlikelihood* that the defendant would engage in further criminal activities that would constitute a continuing threat to society. Article 27, § 413(g), Md. Crimes and Offenses.

Virginia requires a specific finding of future dangerousness before death can be *recommended*. The jury is instructed that circumstances to be considered in mitigation are not limited to those enumerated in the statute. The jury apparently can reject death after weighing mitigating and aggravating circumstances, but no mitigating factors are either enumerated or defined. Va. Code § 19.2-264.4 Compare Article 37.071, Vernon's Ann. Code of Criminal Procedure.

The probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society is one of the listed Oklahoma aggravating factors, but the statute, unlike that of Texas, requires that the jury be instructed to weigh any mitigating evidence against the aggravating circumstances. Okla. Stat., Title 21, § 701.12(7).

Psychiatric testimony is admissible in capital sentencing in Oklahoma and this Court rejected death where mitigating psychiatric testimony was not considered as a matter of law, *Eddings* v. *Oklahoma*, ___U.S. ___, 71 L.Ed.2d 1 (1982), quoting from *Lockett* v. *Ohio*, 438 U.S. 586 (1978):

> "Beginning with *Furman*, the Court has attempted to provide standards for a constitutional death penalty that would serve both goals of measured, consistent application and fairness to the accused . . . Id. at 8 . . . and . . . in *Gregg*, supra, the plurality held that the danger of an arbitrary and capricious death penalty could be met by a carefully drafted statute that insures that the sentencing authority is given adequate information and guidance . . . (at 195).

The Washington death penalty statute, amended in 1981, has the prediction of future dangerousness as one of eight circumstances that the jury might consider in deciding *whether leniency is merited*. R.C.W.A. 10.95.070. Other factors are essentially the same as those enumerated in the Virginia statute. The court or jury, after hearing any evidence deemed probative, including hearsay, evidence of the defendant's background, prior criminal activity including pending charges is specifically instructed to weigh aggravation against mitigation in answering the general question:

> "Having in mind the crime of which the Defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?" R.C.W.A. 10.95.040.

In Maryland, the sentencer must first find that one or more of ten aggravating circumstances exist, Article 27 § 413 and, if so, then the existence of any one of seven mitigating circumstances are considered.

One of the mitigating factors is whether "it is unlikely that the defendant will engage in further criminal activity that would constitute a continuing threat to society." Art. 27, § 412(7).

Any of the mitigating circumstances, found by a preponderance of the evidence, are weighed against the aggravating circumstances, and if the sentencer determines from a preponderance of the evidence, that the mitigating facts outweigh the aggravating facts, the sentence shall be life.

The Maryland statute requires that the sentencer specify the aggravating and mitigating circumstances found to exist and which one outweighs the other. The basis for the verdict must be specified.

Although psychiatric testimony would be admissible on the likelihood of future criminal activity that would constitute a continuing danger to society, its impact would be far less damaging than the same prediction under the Texas statute. The instruction to consider whether other mitigating factors exist, and the option to weigh the evidence, places this potentially prejudicial testimony in focus as *one* of the factors to be considered.

Idaho requires an inquiry into mitigating and aggravating circumstances in capital sentencing, and the court assesses punishment after making written findings setting forth any aggravating circumstances found, including "whether the defendant, by prior conduct or conduct in the commission of the murder at hand, has exhibited a propensity to commit murder which will probably constitute a continuing threat to society." Here, the propensity to commit murder is a much more specific circumstance than general acts of violence constituting a continuing threat to society found in the other statutes considering future dangerousness. I.C.A. § 192515.

At the sentencing, the court may appoint a psychiatrist or psychologist to examine the defendant if there is reason to believe the defendant's mental condition would be a factor in sentencing. (§§ 19.2522 and 19-2523) That examination must be controlled by this Court's ruling in *Estelle* v. *Smith*, supra.

Psychiatric testimony is admissible in Idaho, but it is specifically directed toward answering whether the defendant creates any risk of danger for the public, if at large. This qualifica-

tion would limit the danger of the Grigson-Holbrook type testimony, which is designed to eliminate the jury's consideration of a life sentence because of the potential danger to prison inmates and personnel.

The propensity to commit future murders, if determined by reliance on psychiatric testimony, still does not mandate death since the sentencing authority is required to set forth, in writing, mitigating and aggravating factors considered, and if the former outweighs the latter, the imposition of death would be unjust. The guidance exists for the sentencing authority and the reviewer of the sentencing process can determine the basis for the sentence. No such safeguards exist under the Texas procedure.

The other 34 death penalty states permit evidence of any matter deemed relevant to sentence, regardless of the ordinary application of the rules of evidence. In capital sentencing, the usual rules of procedure do not apply, so in each of these states, although the specific issue of whether the defendant would commit future acts of violence that would constitute a continuing threat to society may not be asked, the courts might admit psychiatric testimony to assist the sentencer in answering the ultimate issue.

Where there is no instruction that mitigating circumstances be weighed against aggravating circumstances, and the jury is not guided in what evidence to consider in mitigation, "the goals of measured, consistent application and fairness to the accused" announced by this Court in *Furman*, supra, are not met.

The California Supreme Court has specifically recognized the inherent unfairness of psychiatric predictions of future dangerousness and has prohibited such testimony. *People* v. *Murtishaw*, 631 P.2d 446 (1982).

There a psychopharmocologist testified at the penalty stage that Murtishaw would continue to be a violent and assaultive person in prison, reacting to frustration with physical aggression, and show the same type of homicidal tendencies that he

has shown in the past. The court reversed the death penalty reasoning that:

> "(1) expert predictions that persons will commit future acts of violence are unreliable and frequently erroneous;
>
> "(2) forecasts of future violence have little relevance to factors before a jury under their statute;
>
> "(3) such forecasts despite their reliability and doubtful relevance may be extremely prejudicial to the defendant." (Id. at 466).

The *Murtishaw* court had previously taken judicial notice of the many studies demonstrating the unreliability of predictions that violent behavior could be predicted over a long term. *People* v. *Burnick*, 14 Cal.3d 306 (1975). The court noted new studies reviewing the high percentage of false positives supporting the view that psychiatrists are generally inaccurate predictors, citing Cocozza & Steadman's, *The Failure of Psychiatric Predictions of Dangerousness: Clear and Convincing Evidence*, (1976) 29 Rutgers L. Rev. 1084; Monahan, *The Prediction and Control of Violent Behavior* (Hearings before the House Subcommittee on Domestic and International Planning (1978), among many others.

This Court has recognized that the death penalty is a qualitatively different kind of punishment and "because of that qualitative difference, there is a corresponding need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson* v. *North Carolina*, 428 U.S. 280, 305, (1976).

George Dix, in his article *The Death Penalty, 'Dangerousness,' Psychiatric Testimony and Professional Ethics*, 5 Am. J.Crim.L. 151, 212(1977) addressed that very issue:

> "[a]lthough the utilization of predictive testimony by mental health experts in death hearings does not differ in many ways from reliance upon it in other contexts, the unique severity of the penalty increases the importance of avoiding unjustified reliance upon predictions of 'dangerousness' " (at 212).

B. The Dangerousness Issue In Barefoot

The testimony of Grigson and Holbrook, elicited in response to a hypothetical question, constituted error of a constitutional magnitude violating petitioner's rights under the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States because: 1) The question was not hypothetical, but was a fact question calling for a diagnosis and expert opinion concerning Thomas A. Barefoot; 2) An expert's opinion is inadmissible where based on erroneously admitted evidence; 3) An expert's opinion is incompetent where no examination of the defendant is performed and the opinion is without scientific or technical support; 4) the question called for no psychiatric or psychological expert opinion; and, 5) the question was one in which the jurors who had heard the same evidence were competent to answer without the aid of "expert" testimony.

The unwarranted opinions of Grigson and Holbrook were unreliable. They invaded the province of the jury and in effect mandated the jury's affirmative answer to the future dangerousness issue. The data presented to the two psychiatrists was not hypothetical, it was factual, and had just been heard by the jury. It was clearly directed toward eliciting an opinion about the defendant on trial, not a hypothetical person. It was designed for the specific purpose of eliminating the jury's consideration of a life sentence. Such expert opinion given by a psychiatrist to a lay jury, has an impact that without doubt contributes to an affirmative answer to the dangerousness issue depriving a defendant of his right to have the jury determine the facts.

In *White* v. *Estelle*, ___ F.Supp. ___, [No. H-81-1661, December 30, 1982] (S.D.Tx. 1982), State's expert, Dr. Nottingham was asked:

> "Assume with me that a defendant named *Larry Wayne White* was on trial for a capital murder and had been found guilty of that capital murder and it was shown in the evidence—and you're assuming with me that the evidence is correct—that he was convicted in 1972 of assault and battery; convicted in '73 of assault and battery; convicted

> again in '73 of resisting arrest; convicted of committing a first-degree murder in the State of Florida which occurred February 22nd, 1977; and then convicted in the case on trial of committing another capital murder in the State of Texas. What would be your professional opinion concerning the question which you are familiar with on probability? (Id. at 1681)

Following Nottingham's affirmative answer that the "hypothetical" defendant would be a future danger, the State's psychologist, Jerome Brown, Ph.D, was questioned on the same facts and gave similar testimony, adding that White was hedonistic.

The court rejected the argument that sought to distinguish *White* from *Smith* on the basis that doctors were testifying about an hypothetical person, not White, and were not testifying about their psychiatric evaluation of him:

> "The doctors had previously interviewed the petitioner; they knew they were testifying at the sentencing hearing of Larry Wayne White. The facts of the hypotheticals were the facts of White's criminal history . . . In one hypothetical, Larry Wayne *White's name was used.* A hypothetical is not a hypothetical just because it is initiated by the word "assume" or "if" . . . The jurors were familiar with petitioner's criminal record. They could not miss the implication of the state's identification of the subject of the hypothetical as Larry Wayne White . . . it is clear that the jurors were incapable of distinguishing between the hypothetical and the case of petitioner before them." (Id. at 10)

The validity and acceptability of an expert opinion must depend on the reliability and validity of the facts upon which it is based. It is immaterial that the expert is not personally acquainted with the facts, so long as the *basis for the opinion is valid.* That certain facts are controverted does not affect the opinion. Counsel is free to cross examine the witness on a different set of assumptions. However, where there has been no personal examination of the individual, and the jury cannot distinguish between the "hypothetical" person and the defendant, the impact on the jury is not just possible, but probable. *White,* supra; *Clark* v. *State.*

The"hypothetical" used to elicit expert medical and psychiatric opinions, if not based upon psychiatric or psychological data within the area of expertise of the witness, is unreliable, inadmissible, prejudicial evidence that only distorts the jury's fact finding function. The trend in Texas is to bolster a common sense, lay jury issue with a cloak of medical expertise that confounds the jury with its impact, leading them to the inescapable conclusion that the answer to the future dangerousness issue must be yes, the punishment must be death because the expert has no doubt.

The Court in *Jurek*, supra, anticipated that the jury would weigh all relevant evidence. But where a medical expert testifies with certainty that the defendant will be a continuing threat to society, in or out of prison, no rebuttal or cross examination can diminish that impact.

Any testimony that Barefoot was married, had children, loved his family and they him, went to church, graduated from high school or had friends could not have rebutted the experts' conclusions that wherever Barefoot went he had a bad reputation, known in *one-tenth* of the United States. That Barefoot's mental, emotional or judgmental capacity was affected by drugs or other intoxicating substances could carry no weight where an expert informs the jury that the use of such substances is a sure sign of sociopathy, a hopelessly untreatable condition, particularly in Barefoot's case, rendering him dangerous forever unless executed.

Cross examination was and will always be futile where this "expertise" is admitted before a jury.

Grigson and Holbrook, both psychiatrists were called by the State for their expert opinion of the type of personality of Thomas A. Barefoot, the individual described in the "hypothetical" question.

The facts to be assumed true posed in the "hypothetical" question to the psychiatrists were from five sources: (1) inadmissible hearsay testimony elicited from police officers or prosecutors at the punishment hearing; (2) a recounting of

facts elicited at the guilt stage of the trial, embellished with conclusions, and speculation; (3) facts of the offense itself; (4) prior convictions, two felony and one misdemeanor drug offense; one felony weapons possession; one federal possession of unregistered weapons charge; and (5) a three count felony indictment pending in New Mexico.

Holbrook and Grigson, had not previously met or examined Barefoot, nor had they listened to the trial testimony or observed witnesses. They informed the jury that as doctors of psychiatry they were able to give an expert medical opinion, within a reasonable medical certainty about the personality of Thomas Barefoot and could, with the same reasonable medical certainty, predict whether he would commit acts of violence that would constitute a continuing threat to society. Their only requirement was they be given sufficient background *data*. (Holbrook, R. 2072; Grigson, R. 2110).

Gridson bolstered his own credentials by volunteering that psychiatrists are particularly capable of classifying personalities because of their education and experience where the average layman could not (R. 2111). Cf. *Jurek*, supra.

Holbrook claimed that expert psychiatric opinions from hypothetical data was more reliable than an opinion based on an extensive examination, personal history and familial history of an individual because it was more objective. Results of those personal examinations are self serving, according to Holbrook (R. 2094) Cf. A.P.A. Task Force Report; *Murtishaw*, supra, *Holloway*, supra. Holbrook amplified his expertise by telling the jury that he returned to work at the Texas Department of Corrections to confirm the accuracy of his prior predictions of future dangerousness of criminals (R. 2069-2070). Saying nothing more, he permitted the jury to infer that his predictions were indeed accurate. Both men professed to be expert in predicting future dangerousness (R. 2033, 2078).

The facts presented to both psychiatrists were essentially the same. Holbrook testified outside of the presence of the jury that the fact that charges were pending against Barefoot in

New Mexico for aggravated kidnapping and anal and vaginal intercourse with a female child under 13 years of age did not influence his opinion because it was an accusation, not a conviction. That information was not included in the hypothetical data to Holbrook. Since Grigson had no such qualms, it was included in the data presented to him in the presence of the jury.

The balance of the hypothetical can be summarized as follows: Barefoot either acquired or renewed a bad reputation as a peaceful and law abiding citizen in particular towns between the years 1969 and 1978. This hearsay, presented to the jury through law enforcement officers and prosecutors, was clearly based on personal contact with Barefoot. Barefoot's proper objection in and out of the presence of the jury, that the witnesses were in each instance incompetent to testify as to reputation or that the reputation evidence was too remote to be relevant was overruled.

Just prior to the psychiatric testimony, the reputation witnesses testified, assuring that the jury would know that Thomas A. Barefoot was the subject of the hypothetical.

Five prior convictions were included: two for possesion of weapons, three for drug related offenses. The prosecutor claimed Barefoot escaped from custody to "avoid prosecution" in New Mexico.

The question detailed facts from the guilt phase, much of it based upon the testimony of the accomplice witness, Robert Roberson, and included conclusions and speculation, not properly inferred from the evidence, such as: drug laws didn't deter Barefoot; and misstating the evidence, that Barefoot didn't work because he didn't want to, that instead, he manipulated others into providing for him (R. 2078); that Barefoot had no concern for the residential community in Harker Heights because he set fire to a club; that he specifically chose to shoot Levin in the brain; that he did nothing to help Levin after he shot him, point blank, without provocation; and, that leaving town without luggage was clearly a sign that he was not a regular traveler.

Barefoot had been employed but had been injured on the job (R. 1561). There was no other evidence regarding his job history other than he was unemployed for a two month period between June and August 1978.

These *data*, fleshed out considerably, were the basis from which the two psychiatrists gave their expert medical opinion that Barefoot was an untreatable, severe sociopath, whose existence created a future danger to all other humans. (Holbrook, R. 2065-2091; Grigson, R. 2107-1963). Prior to giving their expert opinions, both psychiatrists testified that they had sufficient data and facts to make a diagnosis of Barefoot's personality and to predict his future dangerousness, both to a reasonable medical certainty.

Barefoot objected in and out of the presence of the jury to the competency of the expert witnesses; that the assumed facts consisted of controverted facts; and that the facts included speculation and conclusions; that the hypothetical contained no mitigating facts; that the psychiatric opinions invaded the province of the jury to answer a legal question, the ultimate issue before the trial of fact (R. 2042, 2090, 2126).

Holbrook testified that the facts pointed to the inescapable conclusion that Thomas A. Barefoot was a criminal sociopath (R. 2097) that there was no treatment available (R. 2100); no likelihood that Barefoot would change for the better, but that the badness would only accelerate (R. 2100). Holbrook characterized Barefoot as having a bad reputation in *one-tenth* of the continental United States, *"that we know of"* (R. 2092, emphasis added). He described Barefoot as antisocial, rejecting normal society because the data given lacked facts of loyalty to religion, science, political science, church or family (R. 2092).

Holbrook also found significance in the fact that Barefoot had used an alias in Bell County, after his escape from the New Mexico jail. This showed that Barefoot tended to disregard the normal values of social life with this ascending scale, *maintaining anonymity*, and taking on an alias while at the same time, maintaining considerable mobility, and becoming so well

known that his reputation was common knowledge over a vast area of the United States.

The hypothetical question to Grigson, beginning, "Assuming that *Thomas A. Barefoot*" . . . (R.2110) could leave no doubt in the jury's mind that Grigson was not giving an objective opinion based on a set of hypothetical facts but was considering the diagnosis and predicting the future dangerousness of the defendant on trial. Grigson diagnosed Barefoot as a "fairly classical, typical, sociopathic personality (R. 2128). He explained to the jury that meant that this individual lacks a conscience "like most of *us* develop at an early age." (R. 2128, emphasis added). On a scale of one to ten, Barefoot was in the most severe category [of persons with a sociopathic personality] in fact, above ten (R. 2129). Grigson told the jury that there was nothing in medicine or psychiatry or in any other field that will in any way at all modify or change the severe sociopath. According to Grigson, after a sociopath has killed another human being, the only thing worse is killing many more (R. 2129). That Barefoot would be a danger to society, in the penitentiary or free, was not only probable, but according to Dr. Grigson was *100% absolutely certain.*

Grigson's outrageous prediction, to an absolute certainty, that Barefoot was a future danger to all persons could not have impacted the jury any less that the statement that a defendant was hedonistic, *White* v. *Estelle*, ____ F.Supp. ____ (No. H-81-1661) (S.D.Tex. 1982).

> ". . . a direct assertion by the psychologist that White was hedonistic had a great impact on the jury and was devastating to petitioner's efforts to be sentenced to life rather than death." (Id., at 12).

The American Psychiatric Association, *Task Force Report on the Role of Psychiatry in Sentencing*, drafted in 1982, stated:

> "The psychiatrist who is not careful can *mislead* the judge or jury into believing that a person has a major mental disease simply on the basis of a description of prior criminal behavior. Or a psychiatrist can mislead the court into believing that an individual is devoid of conscience on the

> basis of criminal acts alone . . . *Given our uncertainty about the implications of the finding, the diagnosis of sociopathy or antisocial personality disorder should not be used to justify or support predictions of future conduct.* There is no certainty in this area. *Adding the pejorative term "sociopathy" to the predictive equation without substantial explanation obfuscates the issue.* (Id. at 29, 30)

The Court's mandate in *Smith*, supra, required the Defendant's knowing and voluntary participation in a psychiatric examination that may result in the examiner testifying about future dangerousness. Barefoot didn't have the option of choosing whether to be examined, he was evaluated by remote control of the prosecution-based version of the facts, blessed with the objectivity of a pseudo-medical opinion.

"[A] hypothetical is not a hypothetical just because is is initiated by the word 'assume' or 'if' " *White*, supra, at 10. The inherent danger in psychiatric predictions of future dangerousness was clearly emphasized by the district judge in *White:*

> "This court has serious reservations about the use of psychiatric predictions based on hypotheticals and *doubts their validity when the doctor has had no previous contact with the defendant.* The prevailing view among psychiatrists and professional psychiatric associations, a view to which this Court subscribes, is that to the extent that long range dangerousness can be predicted (a view not accepted by the psychiatric community) an opinion as to an individual's future penchant for violence *which does not follow extensive examination and is not based on a great deal of complex and in-depth information, is not a professional, but a lay opinion . . . When this lay opinion is proffered by a witness bearing the title "Doctor," its impact on the jury is much greater than if it were not masquerading as something it is not."* (Id. at 16, emphasis added).

Texas is aware of the dangers in psychiatric predictions, stating in *Holloway*, supra:

> ". . . opinion testimony, like hearsay, is admissible because it is not based on facts capable of being proved by direct evidence . . . there is nothing to be gained by permitting a witness to proffer an opinion on a subject

> when any other person in the courtroom, any member of the jury, could form an opinion on the issue equally readily and with the same degree of logic as the witness . . ." (at 500).

The admissibility of expert testimony must first be properly determined by the trial court, it is not automatically a matter of "weight" to be determined by the jury. *Holloway*, supra; cf *Barefoot*, supra. An expert's opinion may be inadmissible if there is no evidence or technical or scientific support for it. *Winegartner* v. *State*, 505 S.W.2d 303 (Tex.Cr.App. 1974).

Bad reputation evidence, erroneously admitted and distorted in its presentation, as a basis for medical expert opinions, is inadmissible, incompetent, and unreliable under *Holloway*, supra.

Expert opinion evidence must be tested and limited by the same considerations as other evidence in determining its admissibility: whether its probative value outweighs its prejudicial potential. To be relevant, an expert's opinion must be based on reliable facts. That the expert medical opinion of appellant's future dangerousness was formed without ever examining appellant and on the basis of conversations with "people who knew appellant" was an opinion clearly based on hearsay, was unreliable and was incompetent evidence before a jury trying the ultimate issue to which the opinion relates. *Holloway*, supra, *Reed* v. *Barlow*, supra, *Zillender* v. *State*, 557 S.W.2d 515 (Tex.Cr.App. 1977).

Judge Learned Hand once described the hypothetical question as "the most horrific and grotesque when upon the fair face of justice" (New York Bar Association, Lectures on Legal Topics, 1921-1922). The Court has held that the death penalty may only be imposed after a fair presentation of all the available evidence. *Gardner* v. *Florida*, 430 U.S. 349 (1977); *Gregg* v. *Georgia*, 428 U.S. 153 (1976); see generally *Furman* v. *Georgia*, 408 U.S. 238 (1972). The fairness of the sentencing procedure is measured by the due process clause. *Gardner*, supra, at 358, *Zillender* v. *State*, 557 S.W.2d 515 (Tex.Cr.App. 1977).

Psychiatric testimony lends a mystique to the punishment hearing that surely misleads a jury to believe that such expert opinion is a necessary part of their determination. Judge D. L. Bazelon eloquently delineated the functions of the psychiatrist in the case of *Washington* v. *United States*, 440 F.2d 444 (1967):

> "The function of the psychiatrist is not to try to tell the jurors what verdict they should render but rather portray as fully and completely as possible the mental and emotional makeup of the defendant; how his emotional and intellectual processes work and how they affect his capacity to control his conduct both generally and in the specific situation surrounding the crime charged. They should portray the 'inner man' as best as they can without fanciful speculation.

In *Barefoot* v. *Texas*, supra, the Court of Criminal Appeals of Texas, with no voice raised in dissent, asserted that the use of expert testimony and the testimony of experts based upon hypothetical questions, is a matter of state law, and, under the peculiar Texas statutes, within the exclusive discretion of each individual trial judge, who may admit any evidence he deems relevant to sentence. In *Holloway*, supra, Texas obviously reconsidered such a claim. But *Barefoot*'s rule still stands.

Holloway's retrial in 1982 (Cause No. 64411, in the 124th District Court of Gregg County, Texas) resulted in death being again assessed using Grigson's evil predictions to assist the jury. The hypothetical, framed just as Barefoot's and based on the evidence of the offense itself led Grigson, to the inescapable conclusion that Holloway was 100% absolutely a continuing threat to society and would, without doubt commit future acts of violence. The global purview of the Texas punishment issue predicated upon a finding of future dangerousness, requires exclusion of this type of psychiatric predictions of future dangerousness as a matter of federal constitutional law.

Even if psychiatric predictions of future dangerousness based upon a *legitimate* psychiatric and medical examination be proper at the punishment stage of a capital trial, where these predictions are based, as here solely upon a hypothetical of the same evidence heard by the jury, embellished with the

prosecutor's conclusions, and are submitted to the jury in resolving the issue of future dangerousness, the punishment proceeding is distorted, the accused is denied a fair hearing by the fact finders, and the state is permitted to bolster its non-medical and non-psychiatric "evidence" with the gloss of medical expertise.

Grigson's flat prophecy that Barefoot "most certainly would" commit future criminal acts of violence that would constitute a continuing threat to society, and that the probability of such future conduct was "one hundred percent and absolute," within reasonable psychiatric certainty, was outright quackery and its chicanery went to the very heart of the discretionary sentencing process required by the Eighth and Fourteenth Amendments to the Constitution of the United States.

The evil of such predictions, at least by practitioners like Grigson and Holbrook, under the Texas capital punishment statutes, is that they eliminate the jury's need to consider mitigating evidence. There is no cure, according to these experts, for the criminal sociopath. He cannot even be confined in the Texas Department of Corrections for a term of life imprisonment lest he harm the "society" therein. The Court's assurances in *Jurek*, supra, are meaningless.

There is no room for the "criminal sociopath" category for consideration of the youth of the offender, the fact that he was under the influence of alcohol, or extreme emotional disturbance, and even the existence of circumstances which the offender reasonably believed provided a moral justification for his conduct. *Roberts* v. *Louisiana*, 431 U.S. 633, 637 (1977).

Equally immaterial is the fact that the offender was a party to but did not himself commit the murder. *Lockett* v. *Ohio*, 438 U.S. 585 (1978).

All of these mitigating circumstances are moot under the Grigson-Holbrook caveat that there is no known cure for the sociopath personality. What matters the age of the offender, his part in the crime, whether he was acting under duress or

was under the domination of another, whether he was under an extreme form of mental or emotional pressure, the fact that he was under the influence of drugs or alcohol, or the fact that he reasonably believed in the existence of circumstances which provided a moral justification for his conduct? Even if all these facts be true, if he is a sociopath, he must die.

The Grigson-Holbrook prophecies carefully eliminate the jury's need to consider life imprisonment for the offender. He will be a danger to the inmates and personnel of the Texas Department of Corrections. This all adds up to a mandatory affirmative answer to the second punishment issue and a mandatory sentence of death for the offender.

It can thus be seen that the reliability of such opinions goes to the very heart of the punishment proceedings in Texas capital murder trials.

A majority of this Court swept aside a state procedural rule which excluded relevant and reliable mitigating evidence at the punishment proceeding, holding that such exclusion constituted a violation of the Due Process Clause of the Fourteenth Amendment. *Green* v. *Georgia*, 442 U.S. 95 (1979).

The harm is just as great to a convicted capital offender where the statute permits the admission of potentially unreliable and bolstering aggravating evidence at the punishment proceedings. Cf. *Gardner* v. *Florida*, 430 U.S. 349 (1977).

In *Gardner*, three members of this Court agreed that the sentencing process of a capital trial must satisfy the requirements of the Due Process Clause and that sentencing is a critical stage of a capital criminal proceeding at which the defendant is entitled to the effective assistance of counsel.

As Mr. Justice Stevens noted in *Gardner:*

> ". . .[F]ive Members of the Court have now expressly recognized that death is a different kind of punishment from any other which may be imposed in this country." and: "It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be based on reason rather than caprice or emotion." 430 U.S. at 357-358.

Both psychiatrists in Barefoot's case reached their standard boilerplate pseudo-psychiatric conclusions upon non-medical and non-psychiatric facts. A person's reputation for being a peaceful and law abiding citizen in various communities appears to have little or no medical or psychiatric significance. It may be a social commentary upon those who testify about such "reputation," however. Doubtless the late Doctor Martin Luther King had such a reputation over a wider geographic range than did Barefoot in the same circles that established Barefoot's reputation.

Substantive due process of law at the penalty stage of a capital murder trial, requires the rejection of such testimony. "Jury errors in assessing the credibility of this type of evidence creates a significant risk of inaccurate imposition of the death sentence, and of the perversion of the entire discretionary sentencing process mandated by the eighth and fourteenth amendments." Dix, *Expert Prediction Testimony in Capital Sentencing*, 19 Am.Crim.L.Rev., 1-48, at 48 (1981).

The Texas Legislature framed the ultimate issue regarding future dangerousness as a fact question to be determined by a jury beyond a reasonable doubt, not a reasonable psychiatric certainty, calling for psychiatric testimony. Where medical experts assert that such a probability exists and is 100% certain and absolute, no rebuttal can touch that impact on a jury. The hypothetical truly, in this instance is the most "horrific and grotesque," requiring Barefoot's death sentence be vacated.

This Court's demand for due process and a rational, not capricious decision in assessing death, has provided insulating safeguards in assessing the penalty different from all others. The unique decision to exterminate a citizen must be reached only after a careful, reasoned and fair weighing of reliable, credible evidence. Before a jury can impose a sentence reached by the inescapable conclusion that another human's life cannot be spared, justice demands that the conclusion not be impacted by quackery "masquerading as something it is not." *White*, supra.

There is no doubt that there is a reasonable possibility the testimony of Grigson and Holbrook contributed to the jury's verdict in the punishment phase of Barefoot's trial. *Clark*, supra.

Petitioner's sentencing hearing did not satisfy the due process requirements of the United States Constitution. He was deprived of the effectiveness assistance of counsel because the nature of the psychiatric testimony elicited could not be rebutted and in no way could its impact be diffused. The Grigson-Holbrook testimony removed all jury discretion in considering mitigation contrary to the provisions of the Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution. Petitioner's death sentence must be vacated.

CONCLUSION

The Court of appeals applied an erroneous standard in denying petitioner's application to stay the execution of his death sentence. Neither the decisions of this Court nor the applicable habeas corpus statutes and rules implementing them require a threshhold showing by an appellant of a likelihood that he will prevail on the merits.

This Court has indicated that the most that can be required is a demonstration that the appeal is not frivolous. Some of the circuit courts have broadened this test to require the showing of a "substantial federal issue," but even these holdings conflict with the last word from this Court in *Garrison* v. *Patterson*, supra, and the cases there cited. As to petitioner's second issue, the use of the Grigson-Holbrook boilerplate testimony distorts the penalty determination of the jury and deprived the petitioner of a fair trial of the punishment issue. Petitioner Thomas A. Barefoot prays that this Court set aside the ruling of the Court below and either (1) determine the validity of the constitutional issues raised by the State's use of purported hypothetical psychiatric testimony at the punishment hearing in this Texas capital murder trials, or (2) rule that under the facts of this case, the petitioner was denied due process and equal protection of the law, the effective assistance of counsel

and a fair determination by the jury of the punishment to be assessed in his case. In the alternative, the petitioner prays that this cause be remanded to the court below for the appeal to which petitioner was entitled in the first place.

Respectfully submitted

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APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

2. It also involves the following Federal Statutes and rules, and state statutes:

a. 28 United States Code, Section 2253.

"In a habeas corpus proceeding before a circuit or district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding was had . . .

"An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding where the detention complained of arises out of process issued by a State court, unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause."

b. 28 United States Code, Section 2251.

"A justice or judge of the United States before whom a habeas corpus proceeding is pending, may, before final judgment of discharge, or pending appeal, stay any proceeding against the person detained in any State court or by or under the authority of any State for any matter involved in the habeas corpus proceeding.

"After the granting of such a stay, any such proceeding in any State court or by or under the authority of any State shall be void. If no stay is granted, any such proceeding shall be as valid as if no habeas corpus proceedings or appeal were pending."

c. 28 United States Code, Section 1915(a).

"[A]n appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith."

d. Rule 22(b), Federal Rules of Appellate Procedure.

"In a habeas corpus proceeding in which the detention complained of arises out of process issued by a state court, an appeal by the applicant for the writ may not proceed unless a district or a circuit judge issues a certificate of probable cause. If an appeal is taken by the applicant, the district judge who rendered the judgment shall either issue a certificate of probable cause or state the reasons why such a certificate should not issue. The certificate or the statement shall be forwarded to the court of appeals with the notice of appeal and file of the proceedings in the district court. If the district judge has denied the certificate, the applicant for the writ may then request issuance of the certificate by a circuit judge. If such a request is addressed to the court of appeals, it shall be deemed addressed to the judges as the court deems appropriate. If no express request for a certificate is filed, the notice of appeal shall be deemed to constitute a request addressed to the judges of the court of appeals. . . .

e. Rule 8, Federal Rules of Appellate Procedure.

"(a) Stay must Ordinarily be Sought in the First Instance in the District Court; Motion for Stay in Court of Appeals.

"Application for a stay of the judgment or order of a district court pending appeal, or for approval of a supersedeas bond, or for an order suspending, modifying, restoring or granting an injunction during the pendency of an appeal must ordinarily be made in the first instance in the district court. A motion for such relief may be made to the court of appeals or to a judge thereof, but the motion shall show that application to the district court for the relief sought is not practicable or that the district court has denied an application, or has failed to afford the relief which the applicant requested, with the reasons given by the district court for its action. The motion shall also show the reason for the relief requested and the facts relied upon, and if the facts are subject to dispute the motion shall be supported by affidavits or other sworn statements of copies thereof. With the motion shall be filed such parts of the record as are relevant. Reasonable notice of the motion shall be given to all parties. The motion shall be filed with the clerk and normally will be considered by a

panel or division of the court, but in exceptional cases where such procedure would be impracticable due to the requirements of time, the application may be made to and considered by a single judge of the court . . ."

f. Article 37.071, VERNON's ANNOTATED CODE OF CRIMINAL PROCEDURE

"(a) Upon a finding that the defendant is guilty of a capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment. The proceeding shall be conducted in the trial court before the trial jury as soon as practicable. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence. This subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the State of Texas. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

"(b) On conclusion of the presentation of the evidence, the court shall submit the following issues to the jury:

"(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

"(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society;

". . .

"(c) The state must prove each issue submitted beyond a reasonable doubt, and the jury shall return a special verdict of 'yes' or 'no' on each issue submitted.

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NO. 82-6080

IN THE UNITED STATES SUPREME COURT OCTOBER TERM, 1982

THOMAS A. BAREFOOT,
Petitioner

V.

W. J. ESTELLE, JR., DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS
Respondent

On Writ Of Certiorari To
The United States Court Of Appeals
For The Fifth Circuit

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

(1) What is the appropriate standard for granting or denying a stay of execution pending disposition of an appeal by a federal Court of Appeals by a death sentenced federal habeas corpus petitioner?

(2) Was Petitioner deprived of due process of law by the prosecution's use of hypothetical questions posed to expert psychiatric witnesses regarding Petitioner's future dangerousness at the punishment phase of his bifurcated trial?

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NO. 82-6080

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1982

THOMAS A. BAREFOOT,
Petitioner

V

W. J. ESTELLE, JR., DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS
Respondent

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR RESPONDENT

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES W. J. Estelle, Jr., Director, Respondent herein, by and through his attorney, the Attorney General of Texas, and submits this his brief:

OPINIONS BELOW

The unpublished opinion of the district court in *Barefoot v. Estelle*, No. W-81-CA-191 (W.D. Tex. 1982) is reproduced in the joint appendix, hereinafter, "JA," at 5. The opinion of the United States Court of Appeals for the Fifth Circuit is published as *Barefoot v. Estelle*, 697 F.2d 593 (5th Cir. 1983), and is also reproduced at JA 16.

JURISDICTION

The district court entered its memorandum opinion and judgment adverse to Petitioner on November 9, 1982 (JA 14, 15). Petitioner filed notice of appeal on November 24, 1982, and obtained a certificate of probable cause to appeal on December 13, 1982. Thus, jurisdiction was properly conferred upon the United States Court of Appeals for the Fifth Circuit by virtue of Rule 4(a), Federal Rules of Appellate Procedure; Rule 22(b), Federal Rules of Appellate Procedure; and 28 U.S.C. §2253.

Petitioner filed his petition for writ of certiorari in this Court on January 24, 1983. The same day, the Court exercised its jurisdiction under 28 U.S.C. §2101(e), and S.Ct.R. 18, to review a case pending in a federal court of appeals before judgment "upon a showing that the case

is of such imperative public importance as to justify the deviation from normal appellate practice and require immediate settlement in this Court."

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Petitioner asserts that this case involves U.S. Const. amends. VI, VIII, and XIV. He further relies upon and sets forth in an appendix to his brief 28 U.S.C. §§1915(a), 2251 & 2253, as well as Rules 8, 22(b), Federal Rules of Appellate Procedure. Also involved is Tex. Code Crim. Proc. Ann. art. 37.071, reproduced in Petitioner's appendix to his brief.

STATEMENT OF THE CASE

A. Procedural History

On August 9, 1978, Petitioner was indicted by the grand jury of Bell County, Texas, for capital murder under Tex. Penal Code Ann. §19.03(a)(1), murder of a peace officer acting in the lawful discharge of his official duty. The crime was alleged to have been committed on August 7, 1978. *State v. Barefoot*, Cause No. 26,812. Jury selection began on October 31, 1978. The guilt or innocence phase of Petitioner's trial, bifurcated like all criminal trials in Texas under Tex. Code Crim. Proc. Ann. art. 37.07, began on November 14, 1978. On November 17, 1978, the jury returned a unanimous verdict of guilt. The docket sheets reflect that final arguments of counsel were concluded at 12:45 p.m. and that the jury returned its verdict of guilt at 2:15 p.m.

On November 20, 1978, the punishment phase of trial began. Evidence concluded and the jury retired to deliberate at 10:12 a.m. on November 21, 1978. The jury returned its unanimous death verdict at 11:12 a.m. the same day. Under Tex. Code Crim. Proc. Ann. art. 37.071(f), an automatic appeal was taken to the Texas Court of Criminal Appeals. The en banc Court of Criminal Appeals affirmed the judgment seven-two on March 12, 1980. *Barefoot v.State*, 596 S.W.2d 875 (Tex.Crim.App. 1980). Two dissenting judges would have reversed the conviction for the erroneous admission of extraneous offenses. *Barefoot v. State*, 596 S.W.2d at 889 (dissenting opinion of Clinton, J.). Thereafter, Petitioner was sentenced to die by injection before sunrise on September 17, 1980.

This Court entered a stay of execution pending the filing of a petition for writ of certiorari on July 29, 1980. *Barefoot v. Texas*, _____U.S._____ (1980). The petition was filed under Cause No. 80-5320 on August 27, 1980, and on June 29, 1981, the Court denied the petition and dissolved the stay of execution. On August 14, 1981, Petitioner was again sentenced to death by the trial court, which set his execution sometime before sunrise on October 13, 1981.

Petitioner next filed an application for writ of habeas corpus in state court pursuant to Tex. Code Crim. Proc. Ann. art. 11.07 on September 29, 1981. This application was denied by the Texas Court of criminal Appeals on October 7, 1981.

On October 9, 1981, Petitioner filed his first federal habeas corpus application in the United States District Court for the Western District of Texas, Austin Division. *Barefoot v. Estelle*, No. A-81-CA-422. On October 9, 1981, Petitioner's execution was stayed pending consideration of his application for writ of habeas corpus. Subsequently his application was transferred to the Waco Division of the Western District as *Barefoot v. Estelle*, No. W-81-CA-191. The district court initially set evidentiary hearings for April 26, 1982, and June 10, 1982, both of which were postponed. Respondent, aware of Petitioner's dilatory preparation for these hearings and that motions for continuance were avoided only because of the district court's propitious sua sponte continuances, on June 17, 1982, was moved to renew the motion to expedite consideration that he had originally filed on January 22, 1982. Respondent also asked for an immediate evidentiary hearing and appointment of local counsel.

On June 17, 1982, the district court set an evidentiary hearing for July 28, 1982. On June 24 and 25, 1982, the district court entered a series of four orders ruling upon Respondent's motions. The district court granted Respondent's motion for an evidentiary hearing. He granted Respondent's motion to require the filing of a pre-trial order by July 12, 1982. The court also granted Respondent's renewed motion to expedite consideration:

Petitioner is ORDERED to be ready for the

> hearing on July 28, 1982. If he is not, present counsel shall be dismissed and new counsel appointed at that time.

Finally, the district court ordered the parties to issue all necessary subpoenas by July 12, 1982.

The evidentiary hearing transpired as scheduled on July 28, 1982. On November 12, 1982, the district court entered its findings of fact and conclusions of law (JA 5) and judgment (JA 15) adverse to Petitioner. Respondent moved to vacate the previously entered stay of execution and the court granted that motion on December 8, 1982. Petitioner filed notice of appeal and an application for a certificate of probable cause on November 24, 1982. On December 13, 1982, the district court found probable cause for an appeal under 28 U.S.C. §2253 and Rule 22(b), Federal Rules of Appellate Procedure.

On December 20, 1982, the state convicting court sentenced Petitioner to die sometime before sunrise on January 25, 1983, pursuant to Tex. Code Crim. Proc. Ann. art. 43.14. The same day, Petitioner filed an original application for writ of habeas corpus in the Texas Court of Criminal Appeals. It was denied the next day. On January 11, 1983, Petitioner filed a motion for stay of execution in the Texas Court of Criminal Appeals. It was denied the same day.

Three days later, on January 14, 1983, Petitioner filed an application for stay of execution pending appeal in the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit scheduled oral argument for January 19, 1983, allowing Petitioner's attorney "unlimited time to discuss any matter germane to the decision before us." (JA 17). After having studied the briefs and the record, the court on January 20, 1983, entered an opinion holding that there was no patent substantial merit, or semblance thereof, to any of Petitioner's constitutional objections, and denied the motion for stay of execution. *Barefoot v. Estelle*, 697 F.2d 593 (5th Cir. 1983); JA 16.

On January 24, 1983, Petitioner filed his petition for certiorari in this Court. Following the submission of Respondent's response, Petitioner's supplemental motion for stay of execution, and Respondent's supplemen-

tal response, the Court on January 24, 1983, entered an order treating the application as a petition for writ of certiorari before judgment, and granted certiorari. *Barefoot v. Estelle*, _____U.S._____, 103 S.Ct. 841 (1983).

Meanwhile, Petitioner had filed in the district court, under Cause No. W-81-CA-191, what he styled a motion for stay of execution. The sole substantive ground of this motion is that a witness presented by the prosecution at trial, Mary Richards, had perjured her testimony with knowledge and at the insistence of the prosecution. The district court scheduled an evidentiary hearing for the afternoon of January 24, 1983, in El Paso, Texas. After learning that this Court had stayed Petitioner's execution, the district court postponed the evidentiary hearing in that cause until February 10, 1983. Among the numerous witnesses who testified was Mary Richards. A decision adverse to Petitioner in that cause, which was renumbered as W-83-CA-53, was rendered on March 28, 1983. Petitioner's motion in this Court to stay further proceedings in the district court is pending.

Petitioner has also sought to stay further proceedings in the Fifth Circuit, which has established a moderately expedited briefing schedule for other issues that Petitioner might wish to raise in his appeal from the adverse adjudication in No. W-81-CA-191. The Fifth Circuit on March 3, 1983, denied Petitioner's motion to stay further appellate proceedings in that forum. Petitioner's motion to stay such proceedings is also presently pending before the Court.

B. The Evidence at Petitioner's State Court Trial

1. The Guilt or Innocence Phase of Trial.

On August 7, 1978, Donnie Ray Tiller and Robert Roberson lived in a trailer in Killeen, Texas. Residing with them were Radene Layto, Deborah Forbes and Petitioner, who began living at the trailer in June under the assumed name of Darren Collier (SF 1399-1408). During the summer of 1978, Petitioner asked Tiller many times to get him a gun (SF 1412) and often talked to both Tiller and Roberson about wanting to commit robberies in Harker Heights, Texas, a city contiguous to Killeen (SF 1414, 1512). Petitioner also told Tiller that he had been roughed up during an arrest for public in-

toxication in Harker Heights and that Tiller would be reading about him in the newspaper for killing a Harker Heights police officer (SF 1413-14).

At approximately 2:00 p.m. on August 6, 1978, Petitioner told Tiller that he planned to rob the Oasis Club in Harker Heights on the morning of August 7, 1978, and to create a diversion for the police by setting fire to or blowing up a building in Harker Heights (SF 1415-18). Petitioner left the trailer at 4:00 p.m. August 6, 1978 (SF 1419-20) and at 4:00 a.m. on August 7, 1978, Tiller went to work at the Yellow Cab Company in Killeen, as a dispatcher (SF 1423).

Robert Roberson was also employed by the Yellow Cab Company (as a driver) and began work at 5:00 p.m. on August 6 and finished at 4:15 a.m. on August 7 (SF 1514-15). He returned to the trailer at 4:30 a.m. and went to bed with Deborah Forbes (SF 1516). Petitioner then arrived at the trailer, aroused Roberson out of bed and asked him for a ride to Harker Heights. Petitioner was wearing a white T-shirt, Levi blue jeans, and a pair of pointed toe boots. In his possession were a homemade bomb, a plastic milk jug, and a fully loaded .25 automatic pistol, which he carried in his back pocket (SF 1517-21). Roberson agreed to drive Petitioner to Harker Heights and on the way Petitioner told him that he was going to blow up the Silver Spur located on Highway 190 in Harker Heights (SF 1522). Roberson drove Petitioner to Mickey's Number Four, a drive-in grocery in Harker Heights near the Silver Spur, so that Petitioner could buy some gasoline. Refusing to carry Petitioner to the Silver Spur, Roberson left him armed with a .25 caliber pistol and a gallon of gasoline at the drive-in store and returned to the trailer with the homemade bomb which Petitioner inadvertently had left in the car (SF 1524-28).

At 5:15 a.m. John Edwards, a soldier at Fort Hood, Texas, who resided in Harker Heights, left for Fort Hood driving his usual route, which took him past the Silver Spur (SF 1158-68). As Edwards drove towards Business Highway 190 and approached the Silver Spur, he observed flames coming from the roof of the club and Petitioner facing the fire standing on the edge of the

parking lot next to Highway 190 (SF 1168-74). No one else was present in the area (SF 1171-72). As Edwards started to turn onto Business Highway 190, Petitioner turned and ran across the highway (SF 1174-77). Edwards drove to the police station, informed the police about the fire, and then returned to the scene of the fire (SF 1179-83). As he was driving down Business Highway 190 towards the fire, he observed Petitioner running down the highway towards the intersection of Amy Lane (SF 1194-97). At the scene of the fire, Edwards observed a fire inspector remove a melted plastic jug from the roof of the burning building (SF 1189-90). Edwards then informed the eventual murder victim, Officer Carl Levin, of what he knew about the fire, including observing Petitioner at the scene of the fire and later again near Amy lane. The uniformed officer then left in his marked patrol car down Highway 190 towards Amy Lane (SF 1194-97).

Michael Thrash, a soldier at Fort Hood, lived on Amy Lane. At 5:35 a.m. on August 7, 1978, he left for Fort Hood on foot walking down Amy Lane. While walking, he observed a patrol car with emergency flashers on, parked on Amy Lane at the intersection of Valley Road (SF 1219-27). The spotlight of the patrol car was on some bushes and Thrash observed a man wearing blue jeans and a white T-shirt (SF 1245) walk out of the bushes into the spotlight and approach the uniformed police officer, who was standing next to the patrol car (SF 1228-31). As the two were talking within two feet of each other, the man who appeared out of the bushes shot the police officer in the head without provocation at point blank range (SF 1237-43). The officer fell to the ground and the assailant fled, running down Valley Road. Thrash ran to the patrol car to help the officer, summoned assistance over the police radio, and pursued the assailant a short distance before losing him (SF 1243-46).

Carl Levin, the police officer, died beside his patrol car (SF 1253) with his gun still strapped in his holster (SF

1331). A single shell casing was found between his body and his patrol car (SF 1252). The autopsy revealed that Levin died from a bullet fired at close range that entered the left side of his forehead two inches above his left eyebrow and passed through his brain (SF 1743-53). The projectile was recovered (SF 1752) and ballistic tests established that it was fired into the head of Carl Levin from a distance of 3-6 inches (SF 1780).

Mary Richards lived on Valley Road near the intersection of Amy Lane and while in bed before 5:45 a.m., she heard two shots. According to her testimony, Richards looked out of her bedroom window facing the street and observed a man resembling Petitioner wearing a white T-shirt (SF 1277) running down Valley Road away from Amy Lane (SF 1258-69). While Richards stated that she could not positively identify the fleeing man, she described him as about five feet five inches to five feet seven inches tall, having a muscular build and wavy, coarse hair, and pointed out Petitioner as resembling him (SF 1265-69).

At approximately 10:45 a.m. the same morning, after hearing the news on the radio, Donnie Ray Tiller received a phone call at the office of the Yellow Cab Company from Petitioner (SF 1426-28). Regarding the shooting of the police officer in Harker Heights earlier that morning, (SF 1432), Petitioner told Tiller "I shot him. I killed the mother fucker. I shot him in the head." (SF 1429). Petitioner asked what he should do and stated that he was calling from the Gibson's Store on Highway 190 and that he would call back. After this conversation, Tiller related to Detective Carl Trippet of the Killeen Police Department the substance of the phone call (SF 1430).

Later the same morning, three police officers went to the trailer belonging to Tiller and Roberson looking for Petitioner and awoke Roberson. Petitioner was not there and after the officers left, Roberson went back to bed, only to be awakened again — this time by Petitioner (SF 1529-32). Petitioner was dressed like he was when

Roberson last saw him, wearing a white T-shirt, blue jeans and boots, but his face, mustache and white T-shirt were speckled with blood (SF 1523-33). Petitioner was in a state of panic (SF 1534). Roberson told him that the police were looking for him. Petitioner then told Roberson that he had to get out of town because "he wasted a cop, that he killed a cop." (SF 1533). Roberson asked him how he killed the police officer and Petitioner demonstrated how he committed the crime by putting his hand in his back pocket, pulling his hand out and putting his finger against Roberson's head at the place that corresponded to the bullet wound on the head of the slain officer (SF 1534-35). Petitioner then washed up, changed clothes wearing blue jeans, a brown knit-shirt, and a jean vest and left the trailer (SF 1534-38).

Later that morning, Petitioner met Francisco Hernandez on a street in downtown Killeen. Petitioner told Hernandez that he had lost his job and got kicked out of the Star Motel where he was staying with a friend (SF 1599-1602). Hernandez invited Petitioner to his home where Petitioner ate lunch, slept in the afternoon and stayed the night (SF 1604-10). The next morning, August 8, 1978, Hernandez listened to a news broadcast on the radio describing Petitioner and then inquired, "That's you they're looking for." Petitioner replied, "I am the one that they're looking for, but I didn't kill no policeman." Hernandez asked Petitioner to turn himself in, but he refused (SF 1612-14). Hernandez then asked Petitioner to leave and Petitioner shaved off his mustache and changed into another shirt that Hernandez gave him (SF 1615-16). They then left Killeen and went to the bus station in Belton, Texas, where Petitioner decided to take the next bus to Houston. Hernandez left Petitioner in Belton and hitchhiked to Austin, where he went to the police station and informed the police that the bus carrying Petitioner would arrive in Houston at 11:30 p.m. (SF 1617, 28).

Two Texas Rangers and three Houston Police Officers arrested Petitioner in the Houston Greyhound Bus Sta-

tion shortly after 11:20 p.m. on August 8, 1978 (SF 1662-72). A fully loaded .25 caliber automatic pistol was found in his right rear pocket (SF 1675-80). Ballistic tests conclusively revealed that the projectile that killed Officer Carl Levin and the shell casing found beside the body of the slain officer were fired from the pistol found in Petitioner's pocket (SF 1781-82).

To show Petitioner's motive for killing Officer Levin, the prosecution presented evidence that Petitioner had been arrested and indicted in New Mexico for the offenses of sexual penetration of a minor and kidnapping and that while waiting for trial on those charges, he escaped from jail.[1] Mike Roach testified that he was a peace officer in Grants, New Mexico, and that on October 29, 1977, he arrested Petitioner in New Mexico for the offense of sexual penetration of a minor and took him before a magistrate (SF 1113-17).

Judge John Horececk testified that he is a magistrate of Valencia County, New Mexico, and that on November 1, 1977, he arraigned Petitioner for the offense of sexual penetration of a minor and kidnapping; that he informed him that the maximum penalty for the sexual penetration was life imprisonment; that the punishment for kidnapping was from five to fifteen years imprisonment; and that he committed Petitioner to the Valencia County jail in lieu of $100,000.00 bond (SF 1118-22).

There was further testimony that Petitioner and another prisoner on January 19, 1978, escaped from the Valencia County Jail by knocking a hole in their cell wall, entering an adjoining cell, and fleeing out a window that they removed (SF 1122-25; 1138-42). Ronald Childress testified that he represented Petitioner upon the indictment in Cause No. 4374-C pending against him

1. The prosecution gave Petitioner notice on October 16, 1978, that the State intended to prove that he was charged by indictment with the offense of rape and kidnapping of a child and that while waiting trial in New Mexico on those charges, he had escaped from jail (Tr. 193).

for sexual penetration of a minor and kidnapping and that the case was set for trial for the week of January 30, 1978 (SF 1125-31).

The prosecution introduced into evidence a copy of the indictment in Cause No. 4374-C, styled *The State of New Mexico v. Thomas Andy Barefoot*, charging Petitioner with rape, sexual abuse and kidnapping of a child (SF 2233); a copy of the arraignment in Cause No. 4374-C (SF 2235); a copy of the indictment in Cause No. CR78-40, styled *The State of New Mexico v. Thomas Barefoot*, charging Petitioner with escape (SF 2236); and a copy of the warrant for Petitioner's arrest for escape that issued in Cause No. CR78-40 (SF 2237).

2. The Punishment Phase of Trial

The prosecution proved that Petitioner had been previously convicted of the following offenses:

(1) Possession of an unregistered firearm on October 24, 1975, in Cause No. 75-164 in the United States District Court for the Western District of Oklahoma for which Petitioner was sentenced to one year in prison (SF 1964-66, 2349);

(2) Possession of amphetamines on December 2, 1974, in Cause No. 36858 in the 15th Judicial District Court of LaFayette Parish, Louisiana for which he was sentenced to 5 years, the imposition of which was suspended for 5 years on the condition that he serve one year in jail and 5 years on probation (SF 1968-71, 2394);

(3) Distribution of marihuana on December 2, 1974, in Cause No. 37573 in the 15th Judicial District Court of LaFayette Parish, Louisiana, for which he was sentenced to serve 5 years, the imposition of which was suspended for 5 years on the condition he serve one year in jail and 5 years on probation (SF 1968-71, 2395);

(4) Possession of marihuana in Cause No. 36859 on November 26, 1974, in the 15th Judicial District Court of LaFayette Parish, Louisiana, for which he was sentenced to serve 6 months in jail (SF 1971-72, 2526); and

(5) Carrying a concealed weapon in Cause No. 37572 in the 15th District Court of LaFayette Parish, Louisiana, on November 26, 1974, for which he was sentenced to serve 6 months in jail (SF 1973-74, 2525).

The prosecution also offered evidence of Petitioner's reputation for peaceful and law abiding citizenship. The State proved through numerous witnesses that Petitioner had a bad reputation for being a peaceful and law abiding citizen in 1969 when he resided in Morgan City, Louisiana (SF 1975-78); in 1972 in New Iberia, Louisiana (SF 1978-79); in 1973 in LaFayette, Louisiana (SF 1980-82); in 1973 and 1974 in New Iberia and LaFayette, Louisiana (SF 1983-87); in 1975 in Oklahoma City, Oklahoma (SF 1988-90); in 1976 in Odessa, Texas (SF 1991-94); in 1977 in Woodward, Oklahoma (SF 1995-2000); in 1977 in Neodesha, Kansas (SF 2001-03); and in 1977 in Valencia County, New Mexico (SF 2004-09).

The prosecution also presented psychiatric testimony at the punishment phase. Dr. John T. Holbrook stated that he had previously testified for both the prosecution and the defense in death penalty cases (SF 2072, 2103). He had never interviewed Petitioner (SF 2073, 2101). The prosecutor then formulated a lengthy hypothetical question to Holbrook (SF 2074-88). In the first part of the hypothetical question, Holbrook was asked to assume that a man from 1969-1978, when he was between twenty-four and thirty-three years of age, had gained a bad reputation for being a peaceful and law abiding citizen in numerous communities in five states. He asked Holbrook to assume that the man had been convicted of the same crimes of which Petitioner has been convicted (SF 2074-77). The prosecutor then recounted essential details of the murder of which Petitioner had just been convicted, including the circumstances that Petitioner had planned to commit drug related crimes (SF 2078); that he had used an alias (SF

2079); that he had stated that he was going to kill a Harker Heights police officer (SF 2080); that he had committed drug related crimes; that he was unemployed; that he had boasted of other crimes he had committed (SF 2081); that he had stated he planned to commit a robbery and murder someone; that he had obtained a gun and a bomb for that purpose; that he had murdered a police officer in the manner that Petitioner had murdered Officer Carl Levin (SF 2082-86); that he had admitted the crime to others and had expressed no remorse for his victim (SF 2088); and that he had then attempted to flee the community.

Holbrook testified that the facts of the hypothetical question established that the subject was "unable to establish any sort of normal kind of relationship to society" (SF 2092) and that he was not "capable of relating to any of the normal institutions that most people live by ..." (SF 2093). He further testified that the subject had demonstrated an "ascending sort of scale of criminal behavior ..." and that it did not sound as though incarceration would be rehabilitative. He noted that the subject had used aliases (SF 2094); was an "extremely self-serving person" (SF 2094); was manipulative of others; was intent on committing serious crimes; and that he had boasted of crimes he had committed (SF 2095).

Holbrook testified that these are the characteristics of a criminal sociopath (SF 2097), which he described as:

1. Exhibiting criminal anti-social behavior (SF 2098);
2. "Extremely self-centered and self-serving";
3. "Unable to form loyalties to the normal institutions such as family, friends, politics, law, religion," or others;
4. Lying and manipulatively using others;
5. Exhibiting a pattern of violence (SF 2099); and
6. Escaping or running away from legal and other problems.

Holbrook testified that there is no effective treatment for such persons (SF 2100).

On cross-examination, the defense emphasized that Holbrook had never examined Petitioner (SF 2101) and that Holbrook had heard no evidence in the case (*id.*). Accordingly, Holbrook did not know if the facts of the hypothetical were true in Petitioner's case and he admitted that if they were not, that would affect his answer (SF 2104). He was forced to admit that the American Psychiatric Association had published a task force report stating that the prediction of future violence is unreliable (SF 2103).

Dr. James P. Grigson, a psychiatrist, stated that he had testified for the defense as well as the prosecution in other cases (SF 2110). He had never examined Petitioner (SF 2110, 2132). After hearing essentially the same hypothetical question that had been posed to Holbrook (SF 2113-26), he testified that the facts of the hypothetical question showed a "fairly classical, typical sociopathic personality disorder." (SF 2128). He testified that persons with such a disorder typically demonstrate lack of conscience; "repeatedly break the rules"; "con, manipulate and use people"; and are only interested in self-gratification. He testified that the subject of the hypothetical was a rather severe sociopath (SF 2129); that there was no effective treatment for such persons; and that the probability that the subject of the hypothetical question would commit future acts of criminal violence posing a continuing threat to society was "at one hundred percent and absolute." (SF 2131).

On cross-examination, the defense emphasized that Grigson had never examined Petitioner (SF 2132) and that he had not been present during trial. Accordingly, Grigson admitted he did not know if the facts in the hypothetical were true in Petitioner's case and that if they were not, that might affect his opinion (SF 2132-33). He also admitted that he was not familiar with the American Psychiatric Association task force report and that he was not familiar with a large number of ar-

ticles and publications about which defense counsel sought to question him. Similarly, defense counsel asked Grigson about his familiarity with a large number of professional journals publishing articles relevant to Grigson's testimony, and Grigson stated that he did not read any of them (SF 2135-36).

Two prosecutors and both defense counsel made closing argument to the jury at the punishment phase of trial. Assistant District Attorney James Leitner made no mention whatsoever of the psychiatric testimony during his argument (SF 2145-56).

Defense counsel Gerald Brown vigorously attacked Holbrook's and Grigson's testimony (SF 2156-66). He argued that based upon the evidence, the jury should know that psychiatrists cannot predict human behavior with any degree of certainty. In light of the professional literature and studies, as well as the American Psychiatric Association task force report (SF 2157), the psychiatric profession particularly cannot predict future dangerousness with any degree of reliability. He emphasized that the state's expert witnesses had never examined Petitioner (2158), and that the hypothetical facts did not support their diagnosis. He also argued that even if Petitioner were a sociopath, it did not necessarily follow that he would commit future acts of violence against society (SF 2160). He argued at some length that the factual basis of the hypothetical questions was false (SF 2160-65), arguing particularly that based upon the evidence, it had not been shown that Petitioner was especially egocentric or manipulative; that he had avoided employment; that he was a schemer or a planner; that he was the prime planner of the escape from New Mexico; or that he was a trouble maker in jail.

During his closing argument, defense counsel Steven Blythe (SF 2166-71) mentioned the psychiatric testimony briefly in a portion of his argument. He, too,

emphasized that the prosecution's psychiatrists had never examined Petitioner and that they had not talked to numerous other persons whose knowledge of Petitioner might have fundamentally altered the psychiatric testimony, such as Petitioner's family, prison or jail officials, school officials, neighbors, or friends. He argued that psychiatrists who would testify under such circumstances were unethical.

Finally, District Attorney Cappy Eads (SF 2172-83) presented his summation. He emphasized that the jury must decide the credibility of the expert witnesses (SF 2175). He admitted, "I do not have a crystal ball to come into this courtroom. I cannot tell you exactly what's going to happen..." (SF 2176). After emphasizing the professional credentials of Holbrook and Grigson, he told the jury:

> "Now, again, you can weigh their testimony and you can say well, I want to put a certain amount of credence here or a certain amount here. But that's what the doctors told you and if in anyway the hypothetical question which I read to Dr. Grigson was in anyway inaccurate or contained anything which you as a jury felt to be untrue, then certainly you disregard that question."

(SF 2178). He then argued the import of the evidence presented at the guilt or innocence and punishment phases of trial.

The docket sheets reflect the jury deliberated no more than one hour before returning a verdict of death. The trial court had instructed the jury, among other things, as follows:

> "The burden of proof is on the State. You are the exclusive judges of the facts proved, of the

credibility of the witnesses, and of the weight to be given to the testimony...

You are further instructed that in determining each of these special issues you may take into consideration all of the evidence submitted to you in the full trial of the case...

There has been introduced the testimony of certain witnesses who purport to be skilled in their line of endeavor. Such witnesses are known in law as expert witnesses. An expert witness is one who is skilled in any certain science, art, business, or profession and possessed a peculiar knowledge acquired by study, observation and practice. You, the jury, are instructed that you may consider the testimony of these witnesses and give it such weight and value as you think it should have, but the weight and value to be given their testimony is for you to determine.

The testimony of any expert, like that of any other witness, is to be received by you and given such weight and value as you deem it is entitled to receive."

JA 4.

C. The Evidence at the Federal Evidentiary Hearing

At the evidentiary hearing on July 28, 1982, four expert witnesses, two psychiatrists and two psychologists, testified. The first, Dr. Fred L. Fason, testified for Petitioner. (R. 7). His testimony was permeated by his philosophical opposition to the kind of testimony given by Holbrook and Grigson at Petitioner's trial, and by his distaste for forensic psychiatrists generally. For example, he criticized Dr.

Holbrook, who had "a very fatalistic philosophy of looking at individuals ... without hope." (*Id.*) Although agreeing that predictions of future dangerousness are most reliable for those who have committed repeated acts of violence in the past, Fason nevertheless said:

> "That is why I don't think psychiatrists should be involved in this situation. I think it ought to be up to the jury."

(R. 90). Although Fason said that he believed in capital punishment, he expressed a doubt that he could ethically testify at the punishment phase of a capital trial in Texas because he believed in imposing the death penalty "for what somebody has done, not for what somebody says they are." (R. 47).

Although Fason had interviewed only a small number of suspected criminals, and admitted that he was familiar with none of the major research regarding the prediction of future violent behavior (R. 75-76), he denied that any psychiatrist might be more expert than he in the field of sociopathic psychiatry. (R. 61, 64). In fact, he proclaimed, "I am more expertise [sic] in the field of forensic psychiatry than most of the individuals who specialize in it." (R. 65). When questioned why he denied a reasonable possibility of special expertise in this area of psychiatry, whereas he admitted it in others such as pediatric psychiatry, he agreed with the statement that psychiatrists who deal with criminals "as a group don't measure up to psychiatrists such as yourself." (R. 68).

Nevertheless, Fason agreed with Dr. Holbrook's six or seven criteria for the diagnosis for sociopathy (R. 32, 86). He admitted that evidence of a bad reputation for being a peaceful and law abiding citizen in numerous communities "might" have psychiatric meaning in conjunction with the other facts of the hypothetical ques-

tion (R. 23), and he stated that involvement in the drug community "would increase my suspicion, in reviewing the history, that he is sociopathic." (R. 24). He stated that the hypothetical question contained enough facts to make an impression, but not a diagnosis. (R. 35-40). He admitted, in fact, that based upon the facts contained in the hypothetical question, "My most probable diagnosis, my impression would be sociopathic personality disorder, antisocial type, severe." (R. 39; see, R. 42-43). He stated that he could form such an "impression" to a ninety percent certainty. (R. 22, 56). He agreed that his impression was "identical to [Grigson's and Holbrook's] diagnosis." (R. 56).

Fason admitted that regarding Grigson's testimony about the ineffectiveness of treatment or the possibility of change for sociopaths, "There is some truth in that, and by and large we do not have effective means of treating the sociopathic personalities." (R. 48, 90). He added, however, the treatment of sociopaths "is expensive, it carries with it a low order of success, and it takes someone who is extremely skilled in the treatment of the sociopath." (R. 28). As an example of someone who had been cured of sociopathy, he cited the son of a wealthy neighbor who was cured after treatment lasting three years at a cost of $300,000.00 (R. 29).

Dr. Wendell Lee Dickerson, a psychologist, testified for Petitioner that he, too, could not ethically testify upon the basis of hypothetical questions at the punishment phase of a capital trial. (R. 108). Based upon the facts of the hypothetical question, Dickerson was asked whether he agreed with Fason's impression that Petitioner was a sociopathic personality, antisocial type, severe. Dickerson replied, "I think he gave a reasonably accurate assessment of that." (R. 116). After declining "to make any diagnostic impression of Mr. Barefoot," (*id.*), Dickerson was asked:

"Q [by Assistant Attorney General Becker]: I'm not asking you to diagnose him in the courtroom. I am asking you to take the hypothetical question as if you would a question on the medical board examination, and whether that is the diagnosis you would make.

A: [by Dickerson]: That would be my first, my first stop, you bet.

Q: And you would think that you were correct?

A: I would think there was a doggone good chance I was.

Q: Dr. Fason said he would be around ninety percent sure. How about you?

A: I probably wouldn't go quite that high, but the sentiment expressed there I would agree with."

(R. 116-17).

Dr. George Parker, a psychologist, testified for Respondent. After enumerating the criteria for a diagnosis of sociopathy (R. 186 *et seq.*), Parker testified that there was sufficient information in the hypothetical question to form an opinion whether the subject were a sociopath (R. 188) and whether he would continue to commit future acts of violence posing a danger to socie-

Dickerson also admitted that the results of Petitioner's Minnesota Multiphasic Personality Inventory, available before Petitioner's trial and at the evidentiary hearing but not seen or relied upon by Drs. Holbrook or Grigson, supported the same diagnosis. (R. 127).

ty. (R. 189-90). He stated the probability at "somewhere around ninety percent," (R. 190), and later stated that he could make such an assessment with "high confidence." (R. 194). He stated that Drs. Holbrook and Grigson and their methods are "are in the realm of accepted psychological practice." (R. 204). Although acknowledging that some psychiatrists, based upon some studies, do not believe that future dangerousness can be reliably predicted, Parker agreed with the position of the American Psychiatric Association as stated in its amicus curiae brief in *Estelle v. Smith*, 451 U.S. 454 (1981):

> "A clinician might be fairly confident that violent behavior would recur, as for example where a parent's past behavior clearly and repetitively evidences physical abuse of his or her children, but as the task force noted the relatively high degree of reliability in these cases is a function of knowing that the base rate of such behavior, that is the rate of repetitive past violent acts, is very high with a person under scrutiny. It would not be necessary that the patient be mentally ill or suffering from a psychiatric disorder in order to predict that such behavior will recur."

(R. 202-03). He agreed that a number of studies have characterized predictions of future dangerousness as futile "because those studies have selected people who do not have a steady persistent history of committing acts of violence." (R. 201). He enumerated a number of these studies (R. 196-199), adding that John Monahan is the "leading thinker on this issue." (R. 195). Thus, Parker testified, predicting future dangerousness among mental patients generally is highly unreliable; convicted felons provide a better pool; and felons who have repeatedly committed violent crimes in the past are the group about which predictions of future dangerousness are most reliable. (R. 196-203).

Finally, Parker testified that he believes it a proper professional role for a psychologist to inform the jury in a capital case of the conclusions he has reached based upon his training and experience. (R. 215).

Dr. Richards Koons, a psychiatrist, testified that there are psychiatric specialists in sociopathy who are more expert that other psychiatrists in making that diagnosis and predicting future dangerousness. (R. 228-29). He discussed the criteria for such a diagnosis and prediction (R. 238-41), and said he believed that the hypothetical question contains adequate information to make just such a diagnosis. (R. 231). He assessed the probability of future dangerousness on the facts of the hypothetical question as "quite high" (R. 231), although, "Now, I wouldn't state it as one hundred percent and absolute." (R. 232). He agreed that predictions of future violence become more reliable when there is a repetitive, persistent history of past acts of violence, as the American Psychiatric Association stated in its amicus curiae brief in *Estelle v. Smith*. (R. 247). Finally, Koons testified that there is little hope of successful treatment of such persons because medical science cannot "instill conscience where none exists as an adult." (R. 234).

SUMMARY OF ARGUMENT

The Stay Issue

Petitioner's argument that a death sentenced habeas corpus petitioner who obtains a certificate of probable cause to appeal under 28 U.S.C. §2253 and Rule 22, Federal Rules of Appellate Procedure, is automatically entitled to a stay of execution pending his appeal, should be rejected. First, such a position is at odds with the statutory scheme enacted by Congress governing appeals in federal habeas corpus cases filed under 28 U.S.C. §2254. Although the prior statutory scheme ex-

plicitly granted such automatic stays, the revisions of these statutes evinces a legislative intent that in some cases, a stay of execution should be denied notwithstanding the granting of a certificate of probable cause to appeal.

Whether the request for a stay pending appeal is considered in the context of Rule 8, Federal Rules of Appellate Procedure, or 28 U.S.C. §2251, providing for the stay of state court proceedings in certain circumstances, staying a state execution in a death penalty case is a serious incursion upon the state judicial process invoking important comity concerns. Such an incursion is unjustified unless the petitioner can present at least one issue with a semblance of patent substantial merit creating at least a reasonable judicial doubt as to his likelihood of success on appeal. Otherwise, the granting of a stay is a useless judicial act, creating further unnecessary and unwarranted delay in the execution of the sentence in the face of an appeal whose result is foreordained.

This result is consonant with this Court's major prior pronouncements upon the matter, including *Garrison v. Patterson*, 391 U.S. 464 (1968); *Carafas v. LaVallee*, 391 U.S. 324 (1968); and *Nowakowaski v. Maroney*, 386 U.S. 542 (1967). These authorities stand for the proposition that once a habeas petitioner has obtained a certificate of probable cause to appeal, his appeal must be disposed of in accordance with the ordinary procedures of the relevant court of appeals, and the habeas petitioner must have notice of such procedures. The petitioner must have the same opportunity for briefing and oral argument accorded other litigants.

All these requirements were fully met in this case. In requesting a stay pending appeal, Petitioner ran the same risk as other appellate litigants that by virtue of his failure to convince the Court of Appeals that his case

contained a substantial issue, denial of the stay might render his appeal moot. Two recent prior authorities of the Fifth Circuit, *O'Bryan v. Estelle*, 691 F.2d 706 (5th Cir. 1982), and *Brooks v. Estelle*, 697 F.2d 586 (5th Cir. 1982), placed Petitioner fully on notice of the procedures that would be followed. Finally, Petitioner was given ample opportunity to brief and orally argue every issue that might support the granting of the stay.

The Fifth Circuit procedures followed in this case are not demonstrably different from those followed in other courts of appeals. The allegedly contrary authorities relied upon by Petitioner were cases involving either a substantial issue or an issue as to which the court of appeals had inadequate time to determine its substantiality. The Fifth Circuit has granted stays of execution in both circumstances.

There is no good reason to alter the procedures followed by the Fifth Circuit in this case. Petitioner properly laments the strains upon the state and federal judicial systems, as well as counsel on both sides, inherent within the last minute legal flurries characteristic of executions. As Petitioner admits, however, eventually in many cases the time for an execution will come; those identical strains will be placed upon the state and federal judicial systems at that point. Petitioner presents no solution to this problem; he simply seeks to postpone it.

Meanwhile, the states suffer irreparable injury by the passing of every day that its constitutionally obtained death sentences are not carried out. The unconscionable delays attendant to death penalty litigation in this country frustrate society's mandate; promote the public perception that the law cannot be carried out; destroy whatever deterrent effect the imposition of the death penalty might otherwise have; and unfairly penalize prisoners with unconstitutional convictions who remain on death row for interminable lengths of time.

There is every reason to believe that justice is promoted, not defeated, by imposing upon death sentenced habeas petitioners a higher burden to obtain a stay than that required for obtaining a certificate of probable cause. Often grounds for relief arise only when an execution becomes imminent. In this case, for example, a witness at Petitioner's trial, apparently moved by the impending execution, contacted Petitioner's attorneys and told them that the prosecution had coerced her to commit perjury at his trial. This ground became one of the two upon which Petitioner urged the Fifth Circuit to stay his execution. The claim has now been resolved adversely to Petitioner following an evidentiary hearing in district court. The record reflects that such speedy resolution of this vexing claim would not have occurred if Petitioner's execution had been stayed automatically when he obtained his certificate of probable cause to appeal.

The Hypothetical Question Issue

Emphasizing the special need for reliable evidence at the punishment phase of capital trials, Petitioner argues that psychiatric predictions of future dangerousness are always unreliable and that in this case, any probative value of such expert testimony was outweighed by its unfairly prejudicial impact upon the jury. The record reflects that these assertions are untrue.

Both the evidence at the evidentiary hearing in district court and the professional literature fully support the finding of the district court and the Court of Appeals that expert predictions of future dangerousness are reliable where there is a repetitively persuasive pattern of past acts of criminal violence. It was shown at Petitioner's trial that during the nine years preceding his trial, he had acquired a bad reputation for being a peaceful and lawabiding citizen in eight communities in five different states. This evidence can only be

characterized as depicting an extensive, repetitive pattern of violent criminal acts. During the same period, he was convicted of numerous crimes, some involving drugs and others involving illegal weapons. In addition to these important components of the hypothetical questions the prosecution posed to its expert psychiatric witnesses at trial, the circumstances of the crime itself supported the experts' opinion that the subject of the hypothetical question was a sociopath, antisocial type, severe, who would probably continue to commit future acts of violence posing a danger to society.

Indeed, all four experts at the evidentiary hearing in district court agreed with this opinion with a high degree of certainty, although Petitioner's experts expressed ethical and philosophical concerns about psychiatrists who give such testimony.

Such expert testimony regarding future dangerousness is highly relevant in the Texas statutory capital punishment scheme, which this Court approved in *Jurek v. Texas*, 428 U.S. 262 (1976). In Jurek and in *Estelle v. Smith*, 451 U.S. 454 (1981), the Court endorsed the use of expert testimony upon the issue of future dangerousness. Petitioner's complaint that such testimony has an unfairly prejudicial impact upon the jury is without substance. The experts in Petitioner's case were subject to the same cross-examination, impeachment, and rebuttal as experts in other cases. The explicitly stated criteria for the experts' responses to the hypothetical questions allowed for the presentation of mitigating evidence that might have changed their opinions. None was presented, presumably because it did not exist. Moreover, Petitioner was free to present evidence that the prosecution's expert testimony was not only erroneous, but outside the realm of accepted psychiatric practice, as he now argues.

In fact, Petitioner was free to present virtually every criticism he now makes of such testimony. His jury was specifically instructed to assess the credibility of all witnesses, including experts, and to give only such weight to such testimony that the jury felt appropriate. To nullify the jury verdict now could only appear as an expression of lack of faith in the American system of criminal jurisprudence, which accords to the jury the judgments Petitioner now asks this Court to make.

ARGUMENT

I. A STAY OF EXECUTION SHOULD NOT BE GRANTED PENDING THE APPEAL OF A DEATH SENTENCED STATE PRISONER IN FEDERAL HABEAS CORPUS UNLESS HE PRESENTS AN ISSUE WITH A SEMBLANCE OF PATENT SUBSTANTIAL MERIT CREATING A REASONABLE JUDICIAL DOUBT AS TO HIS LIKELIHOOD OF SUCCESS ON APPEAL.

Petitioner asserts that the granting of a certificate of probable cause to a death sentenced habeas corpus petitioner creates an entitlement to a stay of execution pending appeal. This suggestion is at odds with the intent of Congress as evidenced by the statutory scheme enacted governing the conduct of habeas corpus appeals; this Court's prior authorities; and considerations of logic and equity.

A. The Statutory Scheme Enacted by Congress Governing Habeas Corpus Appeals Contemplates that a Stay of Execution may be Denied to a Death Sentenced Habeas Corpus Petitioner who has been Granted a Certificate of Probable Cause to Appeal.

The gist of Petitioner's argument is that as a matter of law, a stay of execution should be granted to a death sentenced habeas corpus petitioner who has been granted a certificate of probable cause to appeal. Because Congress has failed to provide for such an exception to the general rules governing these matters, it does not exist.

Congress has provided that a habeas corpus petitioner denied relief may not appeal unless the district court or the court of appeals grants a certificate of probable cause. 28 U.S.C. §2253; Rule 22(b), Federal Rules of Appellate Procedure. Mr. Justice (then Judge) Blackmun in his famous article, has noted the varying formulations of the standard required to grant a certificate of probable cause. [2] These varying formulations continue to find expression in the caselaw today. [3] The Fifth Circuit

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2. Mr. Justice Blackmun's article notes that some of the cases require an absence of frivolity. E.g., *Tate v. United St tes*, 359 F.2d 245, 250 (1966); *Simpson v. Teets*, 248 F.2d 465, 466 (9th Cir. 1957); *Nolan v. Nash*, 316 F.2d 776 (8th Cir.), cert. denied, 375 U.S. 924 (1963). Others refer to a demonstrable lack of substance. E.g., *Chessman v. Dickson*, 275 F.2d 604, 606 (9th Cir. 1960) (any substance at all); *Gay v. Graham*, 269 F.2d 482, 487 (10th Cir. 1959) (no substantial question); *United States ex rel. Stewart v. Ragen*, 231 F.2d 312, 313 (7th Cir. 1956) ("some substantial question worthy of consideration"); *Ex parte Farrell*, 189 F.2d 540, 543 (1st Cir), cert. denied sub nom. *Farrell v. O'Brien*, 342 U.S. 839 (1951) ("unsubstantial or clearly without merit").

3. E.g., *Foster v. Field*, 413 F.2d 1050, 1051 (9th Cir. 1969)(whether the appeal is "without merit" or presents "a substantial question"); *Pratt v. Maine*, 408 F.2d 311, 312 (1st Cir. 1969)(whether the appeal is "without precedent, cited or otherwise"); *Jackson v. South Carolina*, 498 F.Supp. 186, 191 (D.S.C. 1979)(whether the appeal is "frivolous"); *Abduc v. Lane*, 468 F.Supp. 33, 38 (E.D. Tenn.), aff'd, 588 F.2d 1178 (6th Cir. 1978)(whether the appeal is "plainly frivolous" or "constitutes a substantial question worthy of further consideration"); *Gordon v. Secretary of State of Wisconsin*, 462 F.Supp. 307, 308 (E.D. Wisc. 1978)(whether the appeal presents a "substantial question").

has held that a certificate should be granted where there is "a substantial showing of the denial of a federal right." *Stewart v. Beto*, 454 F.2d 268, 270 n.2 (5th Cir. 1971), cert. denied, 406 U.S. 925 (1972); see, *Clements v. Wainwright*, 648 F.2d 979 (5th Cir. 1981).

It appears that Mr. Justice Blackmun's observation in 1967 remains true today:

> If there is a difference in these expressions I suspect that it is of no significance. In most of these cases relief is denied. Certainly, if a matter is frivolous, it is clearly without probable cause. Thus, the cases which speak of frivolity, such as those from our own [Eighth] Circuit, would arrive at the same conclusion on a more substantive standard.

H. Blackmun, "Allowance of In Forma Pauperis Appeals in Section 2255 and Habeas Corpus Cases," 43 F.R.D. 343, 352 (1967). The granting of a certificate of probable cause by a district court may not be vacated by a Court of Appeals. *Nowakowski v. Maroney*, 386 U.S. 542 (1967).

The Fifth Circuit has viewed stays of execution in habeas corpus cases as governed by Rule 8, Federal Rules of Appellate Procedure. The considerations governing the granting of a stay pending an appeal in this circumstance are the following:

> In general, a court, in deciding whether to issue a stay, must consider: (1) whether the movant has made a showing of likelihood of success on the merits, (2) whether the movant has made a showing of irreparable injury if the stay is not granted, (3) whether the granting of the stay would substantially harm the other parties, and (4) whether the granting of the stay would serve the public interest.

O'Bryan v. Estelle, 691 F.2d 706, 708 (1982), citing *Ruiz v. Estelle*, 666 F.2d 854, 856 (5th Cir. 1982); *Ruiz v. Estelle*, 660 F.2d 555, 565 (5th Cir. 1981); *Florida Businessmen for Free Enterprise v. City of Hollywood*, 648 F.2d 956, 957 (5th Cir. 1981); *Drummond v. Fulton County Department of Family and Children's Services*, 532 F.2d 1001, 1002 (5th Cir. 1976). The Court in O'Bryan instructs:

> While "the movant need not always show a 'probability' of success on the merits," he must "present a substantial case on the merits when a serious legal question is involved and show that *the balance of the equities, [i.e.*, the other three factors] *weighs heavily in the favor of granting the stay*." (emphasis in original).

O'Bryan v. Estelle, 691 F.2d at 708.

The Court of Appeals was justified in proceeding under Rule 8, Federal Rules of Appellate Procedure. On October 14, 1981, the district court granted Petitioner's application for stay of execution, the same day it was filed. After the district court entered final judgment adverse to Petitioner on November 12, 1982, Respondent filed a motion to vacate the stay of execution on December 2, 1982. This motion was granted on December 8, 1982. If the Fifth Circuit had stayed this order pending an appeal, the result would have been to stay Petitioner's execution.

Petitioner and several *amici curiae* argue that consideration of a stay should be governed by 28 U.S.C. §2251:

> A justice of judge of the United States before whom a habeas corpus proceeding is pending, may, before final judgment or after final judgment of discharge, or pending appeal, stay any proceeding against the person detained in any

> State court or by or under the authority of any State for any matter involved in the habeas corpus proceeding.
>
> After the granting of such a stay, any such proceeding in any State court or by or under the authority of any State shall be void. If no stay is granted, any such proceedings shall be as valid as if no habeas corpus proceedings or appeal were pending.

It is worth noting that Petitioner in the court below placed no reliance upon 28 U.S.C. §2251.

In truth, there is authority for the proposition that 28 U.S.C. §2251 applies only to the stay of state court judicial proceedings, not to the service or execution of state sentences. *Kleczka v. Massachusetts*, 259 F.Supp. 462 (D.C. Mass. 1966). This view is strengthened by the specific language of §2251, which provides that a stay entered under its auspices has the effect of voiding any further state court proceeding.

Nevertheless, if 28 U.S.C. §2251 indeed provides the proper focus of analysis, its statutory predecessor provided for an automatic stay of execution pending appeal:

> [P]ending such proceedings or appeal, and until final judgment be rendered therein, and after final judgment of discharge in the same, any proceeding against such person so alleged to be restrained or his or liberty in any State court, or by or under the authority of any State, for any matter or thing so heard and determined, or in process of being heard and determined, under and by virtue of such writ of habeas corpus, shall be deemed null and void.

14 Stat. 386 (codified at Rev. Stat. §766, 2d ed. 1878). *See, Rogers v. Peck*, 199 U.S. 425, 436 (1905); *Lambert v. Barrett*, 159 U.S. 660, 662 (1895).

Because the revision of this statute as 28 U.S.C. §2251 fails to provide for an automatic stay of execution, Congress has evinced the intent that such stays not be automatic.

Regardless of the outcome of the arguments concerning the *precise* standard for the granting of a certificate of probalbe cause to appeal as compared to the *precise* standard for the granting of an injunction pending appeal, whether under Rule 8 or §2251, it is nevertheless clear that the former requires a lesser showing than the latter. Obviously, there are cases where a petitioner may satisfy the lesser burden but not the greater. Because Congress has failed to provide that the outcome of these cases should be different where a death sentenced habeas corpus petitioner is the movant, plainly the legislative intent is that there is no entitlement to a stay of execution in a case like his.

B. This Court's Important Authorities Support the Proposition that the Granting of a Certificate of Probable Cause Should Not Entitle a Death Sentenced Habeas Corpus Petitioner to an Automatic Stay of Execution Pending Appeal.

Regardless whether the proper focal point of analysis is Rule 8, Federal Rules of Appellate Procedure, or 28 U.S.C. §2251, plainly the nature of the relief effectively afforded under either provision is an injunction against the execution of orders entered by the state judiciary. Such injunctive relief is a serious incursion upon the state judicial process, evoking many of the concerns expressed in *Younger v. Harris*, 401 U.S. 37 (1971), and other pronouncements of the Court. The standard announced by the Fifth Circuit in *O'Bryan v. Estelle*, 691

F.2d 706 (5th Cir. 1982), and followed in *Barefoot v. Estelle*, 697 F.2d 593 (5th Cir. 1983), seems appropriate in either circumstance.

That standard, and the procedures which implemented it in the Fifth Circuit, also seems appropriate in light of this Court's pronouncements on the subject. In *Nowakowski v. Maroney*, 386 U.S. 542 (1967), the Court held that an appeal proceeding after the issuance of a certificate of probable cause cannot be aborted by the denial of leave to appeal in *forma pauperis*. An indigent habeas petitioner must be afforded the same rights as a non-indigent petitioner. In *Carafas v. LaVallee*, 391 U.S. 234 (1968), the Second Circuit Court of Appeals dismissed an appeal in one sentence after a certificate of probable cause had been granted. This Court held:

Although *Nowakowski* does not necessarily require that the Court of Appeals give the parties full opportunity to submit briefs and argument in an appeal which, despite the issuance of the certificate of probable cause, is frivolous, enough must appear to demonstrate the basis for the court's summary action.

Carafas v. LaVallee, 391 U.S. at 242.

Finally, in *Garrison v. Patterson*, 391 U.S 464 (1968), the district court denied a certificate of probable cause to appeal but granted a temporary stay of execution. After receiving a three page document requesting a further stay of execution, the Tenth Circuit issued an order granting the certificate of probable cause and, "in the next sentence, affirming the District Court's denial of habeas corpus." *Garrison v. Patterson*, 391 U.S. at 465. This Court reversed:

> Carafas requires the Courts of Appeals to give sufficient indication that an appeal has been disposed of on the merits, but nothing in

> *Nowakowski* and nothing we say here prevents the Courts of Appeals from considering the questions of probable cause and the merits together, and nothing said there or here necessarily requires full briefing and oral argument in every instance in which a certificate is granted. We hold only that where an appeal possesses sufficient merit to warrant a certificate, the appellant must be afforded adequate opportunity to address the merits, and that if a summary procedure is adopted, the appellant must be informed, by rule or otherwise, that his opportunity will or may be limited. Within this general framework, the promulgation of specific procedures is a matter for the Courts of Appeals.

Garrison v. Patterson, 391 U.S. at 466-67.

In this case, the procedures followed by the Fifth Circuit complied with all these requirements. First, Petitioner had a full opportunity to brief and orally argue the merits of his case. He alleges that after the Texas Court of Criminal Appeals denied his final application for writ of habeas corpus and stay of execution on December 21, 1982, he was not notified until January 7, 1983.[4] (Brief for Petitioner at 3). He filed his application for stay in the Fifth Circuit on January 14, 1983. On January 17, the court scheduled oral argument on the application for January 19. He complains that this amounted to inadequate opportunity to brief and argue the merits of his case (Brief for Petitioner at 25).

Such a contention is meritless. Petitioner chose to present two issues supporting his motion for stay: the use of hypothetical questions posed to expert witnesses at the punishment phase of his trial, and the allegedly per-

4. Nothing in the record supports this assertion.

jurious testimony of a witness at his trial, Mary Richards. The former of these issues had been briefed on his direct appeal to the Texas Court of Criminal Appeals; in this Court on a petition for writ of certiorari seeking a reversal of that judgment; in one of his state habeas corpus applications; and extensively in the federal district court below. Obviously this issue has been fully briefed on numerous occasions.

The allegedly perjurious testimony of Mary Richards was a new issue, but Petitioner was aware of it on December 27, 1982, when, without informing or giving notice to Respondent's counsel, he took the deposition of Richards in Austin, Texas. Briefs upon the motion for stay of execution were filed in the Fifth Circuit on January 18, 1983. Accordingly, Petitioner had twenty-two days to prepare the substance of his argument regarding this witness. Petitioner was also free to present any other issues previously presented to the district court, all of which had been previously extensively briefed. There is, therefore, no substance to the assertion that Petitioner was deprived of any opportunity to fully brief any issue he desired.

Second, Petitioner had ample notice of the procedures employed by the Fifth Circuit. First, since he cited no other authority, he was presumably proceeding under Rule 8, Federal Rules of Civil Procedure. If so, he was bound to know that he was not entitled to a stay of execution unless he could meet the burden of showing a substantial case on the merits involving a serious legal question. He was bound to know, that he, like other appellate litigants, must bear the risk of the mooting of his appeal if he is unable to obtain a stay pending appeal. *See, 11 Wright & Miller, Federal Practice and Procedure,* §2905 at 325 *et seq.* (1973); 9 Moore's Federal Practice, para. 208.07 at 8-26 et seq. (2d ed. 1982). He was bound to know that such a result would no more unfairly obliterate his right of appeal than it unfairly obliterates the right of appeal of any other appellant who suffers irreparable injury and the mooting of his appeal by virtue

of his failure to convince the court of appeals that he presents a substantial question for review.

If this was not enough, then Petitioner was bound to know that the Fifth Circuit in *O'Bryan v. Estelle, supra*, had announced that a death sentenced habeas corpus petitioner must present a substantial issue with a reasonable likelihood of success on the merits in order to obtain a stay of execution. The same standard was applied in *Brooks v. Estelle*, 697 F.2d 586 (5th Cir. 1982). The Fifth Circuit's action in *Brooks* was upheld by this Court in *Brooks v. Estelle*, 51 U.S.L.W. 3469 (U.S., Dec. 6, 1982).

Third, the Fifth Circuit specifically informed Petitioner that he should fully brief any issue he believed might support a stay of execution, and that at oral argument he would be allotted unlimited time to present any issue he believed would support a stay. In fact, at oral argument, over Respondent's protest, he was allowed to argue the issue pertaining to the knowing use of perjured testimony by the prosecution, which was not an issue that could be presented for appeal because it had not been presented to the district court. [5]

Following oral argument, the judges of the Fifth Circuit sequestered themselves before rendering an opinion the following day. The court used varying, but similar, language at various points in the opinion denying the motion for stay. The court stated that Petitioner had failed to present "a substantial case on the merits of any serious legal question." *Barefoot v. Estelle*, 697 F.2d 593, 595 (5th Cir. 1983); JA 17. The court stated that it had found "no constitutional imperfections of substance." (*Id.*). Finally, the court concluded:

> Finding no patent substantial merit, or semblance thereof, to petitioner's constitutional objections, we must conclude and order that the motion for stay should be DENIED.

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5. The Fifth Circuit follows the common practice that an issue not presented in district court cannot be presented for the first time on appeal. *E.g.*, *Miller v. Turner*, 658 F.2d 348, 350 (5th Cir. 1981); *Page v. United States Parole Commission*, 651 F.2d 1083, 1087 (5th Cir. 1981).

Barefoot v. Estelle, 697 F.2d at 600; JA 26.

The standard applied by the Fifth Circuit in Petitioner's case is not demonstrably different from the standard it has applied in other cases or the standard applied by other Courts of Appeals in death penalty cases. In *O'Bryan v. Estelle*, 691 F.2d 706 (5th Cir. 1982), the Fifth Circuit granted a stay of execution, finding that a substantial question was raised in the appeal, and that the court was unable to give the question adequate review in the three days remaining before O'Bryan's scheduled execution. Similarly, in *Brooks v. Estelle*, 697 F.2d 586, 588 (5th Cir. 1982), the Fifth Circuit denied a stay of execution "because there was no substantial question concerning the correctness of the district court's judgment."

Recently in *Mulligan v. Zant*, 531 F.Supp. 458 (M.D. Ga. 1982), a district court adopted and utilized the "substantial likelihood of success" test in denying an eleventh-hour application for stay of execution. Because the court found "no substantial likelihood" that the petitioner was entitled to federal habeas relief, the stay of execution was denied. In *Shaw v. Martin*, 613 F.2d 487 (4th Cir. 1980), the Eleventh Circuit stated that a "facial showing" of the substance of a claim presented was necessary in order to justify a stay. Indeed, in cases where federal courts have granted stays of execution pending appeal, in each, substantial questions have been identified. *E.g., Booker v. Wainwright*, 675 F.2d 1150 (11th Cir. 1982); *Goode v. Wainwright*, 670 F.2d 941 (11th Cir. 1982); *Foster v. Strickland*, 515 F.Supp. 22 (N.D. Fla. 1981); *Modesto v. Nelson*, 296 F.Supp. 1375 (N.D. Cal. 1969); *see also, United States v. Restro*, 529 F.Supp. 579 (W.D. Pa. 1982).

In other cases, a court of appeals has concluded that it had inadequate time to determine whether a substantial issue were presented. For example, in *Dobbert v. Strickland*, 670 F.2d 938, 940 (5th Cir. 1982), the court said:

> It was apparent to the Court that a responsible review of the district court proceedings could not be accomplished prior to the scheduled time for execution of sentence.

Because the court had inadequate time to make that determination, a stay was granted.

The Fifth Circuit did not apply, and Respondent does not advocate, any different standard in this or other death penalty cases. If there is inadequate time for a court of appeals to conclude in good faith that no substantial issue is presented in support of a motion for stay of execution, then the motion should be granted. Although the dilatory filing of a motion for stay of execution might be grounds for censuring or otherwise disciplining a petitioner's counsel, Respondent does not aver that it is a basis for denying a motion for stay. Also, if a court of appeals entertains a reasonable judicial doubt as to the possible outcome of an issue on the merits, a stay should be granted. If not, however, the granting of a stay appears as a useless judicial act of wasteful futility. The burden Respondent asks the Court to place upon death sentenced habeas petitioners is not a heavy one. If it cannot be met, then there is no reason to defeat society's mandate and delay the inevitable.

C. Considerations of Logic and Equity Militate Against the Granting of Automatic Stays of Execution to Death Sentenced Habeas Corpus Petitioners who have Obtained Certificates of Probable Cause to Appeal.

It is first suggested that the states have little or no interest in expeditiously carrying out executions that have been ordered as a result of state judicial proceedings culminating in multiple determinations that no constitutional error infects the defendants' trials. (Brief of Amicus Curiae American Bar Association at 23). Respondent strongly contests this suggestion. In death penalty cases, more than any other, delay defeats justice. Petitioner stands convicted of a capital offense committed almost five years ago. Since then, the validity of his conviction and sentence have been in constant litigation. The merits of Petitioner's claims have been before state and federal courts for full review no fewer than eight times. Petitioner's execution previously has been stayed to permit full litigation of his claims. The merits of Petitioner's grounds for federal habeas corpus relief were extensively briefed by the parties in the district court and in the court of appeals. The district court conducted a full and fair evidentiary hearing to enable Petitioner to support any evidence and argument

in support of his claims. Following the hearing and submission of proposed findings of fact and conclusions of law by the parties, the court issued an extensive opinion, discussing in detail each claim raised by Petitioner.

The State of Texas has a substantial interest in bringing these proceedings to a close, and in the enforcement of its valid and lawful judgment. Further unnecessary delay now diminishes any deterrent effect the death penalty might otherwise have. It erodes public confidence in the judiciary, and promotes the view that the law cannot be carried out. Delay is a pernicious influence in the law, and never more so than in death penalty cases.

Petitioner and the American Bar Association as amicus curiae lament the last minute legal flurries that exert unfortunate strains upon the state and federal judicial systems, as well as counsel on both sides. Respondent also regrets this reality, but respectfully submits that it is unavoidable. At some point, executions will be carried out. It is more than a little fatuous to suggest that last minute legal flurries will not occur if the Court will but grant Petitioner's request and establish, as a matter of law, that a stay of execution is automatic upon a death sentenced habeas corpus petitioner's first journey through the federal appellate habeas corpus system. Petitioner cannot seriously suggest that if he is granted such a stay during his first set of appeals, that he will sit quietly by thereafter and make no efforts at the last minute to stop his execution after his first set of appeals has been concluded. Mr. Justice Rehnquist has addressed the problems:

> There may be good reasons for the delay, but there is also undoubtedly what Mr. Justice Holmes referred to in another context as a "hydraulic pressure" which is brought to bear upon any judge or group of judges and inclines them to grant last minute stays in matters of this sort just because no mortal can be totally satisfied that within the extremely short period of time by such a late filing he has fully grasped the contentions of the parties and correctly resolved them.

Evans v. Bennett, 440 U.S. 1301, 1307 (1979). Petitioner presents no plan to avoid these unfortunate pressures; he seeks only to postpone them as long as possible.

Finally, there is good reason to believe that justice is promoted, not defeated, by undergoing such pressures now rather than later. In the instant case, for example, the issue pertaining to the allegedly perjurious trial witness, Mary Richards, surfaced only after the execution of Petitioner became imminent. It was only then that Richards came forward and offered herself to Petitioner's attorneys. Fortunately, the matter has now been wholly resolved, following an evidentiary hearing held in district court. *Barefoot v. Estelle*, No. W-83-CA-53 (W.D. Tex. 1983). If Petitioner's execution had not been imminent, however, the matter would have lain quietly for an indeterminate additional period of time. Obviously passage of time in the face of claims such as this renders more difficult the ascertainment of truth.

Respondent suggests that there are many ameliority effects of proceeding as swiftly as possible to justice, without compromising the quality of that justice. Those considerations further support Respondent's contention that stays of execution should not be automatic in death penalty cases merely because the petitioner has secured a certificate of probable cause to appeal.

II. PETITIONER WAS NOT DEPRIVED OF DUE PROCESS OF LAW BY THE USE OF HYPOTHETICAL QUESTIONS POSED TO EXPERT PSYCHIATRIC WITNESSES AT THE PUNISHMENT PHASE OF HIS BIFURCATED CAPITAL TRIAL.

A. The Texas Statutory Scheme and the Court's Prior Pronouncements Illustrate the Appropriateness of Expert Psychiatric Testimony at the Punishment Phase of a Texas Capital Murder Trial.

In capital cases, like all criminal cases, Texas follows a bifurcated procedure in which there are separate guilt or innocence and punishment stages of trial. Tex. Code Crim. Proc. Ann. arts. 37.07, 37.071. Article 37.071

deals specifically with the procedure to be followed during the punishment stage of a capital trial. After the defendant has been convicted of capital murder under Tex. Penal Code Ann. §19.03, the trial proceeds under Article 37.071 to determine whether the defendant will receive the sentence of life imprisonment or death. At the close of the punishment hearing, three special issues are submitted to the jury. The first relates to whether the defendant's conduct that caused the death of the deceased "was committed deliberately and with the reasonable expectation that the death of the deceased or another would result." The second relates to whether "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." The third, submitted to the jury only if raised by the evidence, inquires whether the conduct of the defendant in killing the deceased "was unreasonable in response to the provocation, if any, by the deceased."

The prosecution must prove each issue beyond a reasonable doubt, and the jury is required to return a special verdict of "yes" or "no" on each issue submitted. The jury may not answer "yes" unless it agrees unanimously, and it may not answer any issue "no" unless ten or more jurors agree. If the jury returns an affirmative finding on each issue, the trial court must sentence the defendant to death, but if the jury returns a negative finding on any of the issues, the court must sentence the defendant to life imprisonment in the Texas Department of Corrections. Article 37.071 also provides for automatic review by the Texas Court of Criminal Appeals upon any conviction and sentence of death.

This Court upheld this statutory scheme in *Jurek v. Texas*, 428 U.S. 262 (1976). The Court there rejected the argument that requiring the jury to predict future behavior "is so vague as to be meaningless." Jurek at 274. The Court had no occasion to enumerate specifically the nature of the evidence the jury might appropriately hear, but the Court was unequivocal in its conclusion that a jury is capable of making such a determination reliably:

> What is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine.

Jurek at 276. Specifically regarding the prediction of future dangerousness, the Court held:

> [P]rediction of future criminal conduct is an essential element in many of the decisions rendered throughout our criminal justice system. The decision whether to admit a defendant to bail, for instance, must often turn on a judge's prediction of the defendant's future conduct. And any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose. For those sentenced to prison, these same predictions must be made by parole authorities. The task that a Texas jury must perform in answering the statutory question in issue is thus basically no different from the task performed countless times each day throughout the American system of criminal justice. (footnotes omitted)

Jurek at 275-76.

The Court spoke more directly to the issue of psychiatric testimony at the sentencing stage of the Texas capital trial in *Estelle v. Smith*, 451 U.S. 454 (1981). The Court disapproved of the use of such testimony when based upon an interview with the defendant without prior notification to defendant's counsel and with no appropriate warnings to the defendant under *Miranda v. Arizona*, 384 U.S. 463 (1966). The Court added, however:

> "[U]nder the Texas capital sentencing procedure the inquiry necessary for the jury's resolution of the future dangerous issue is in no sense confined to the province of psychiatric experts."

451 U.S. at 473. The Court continued:

> "While in no sense disapproving the use of psychiatric testimony bearing on the issue of future dangerousness the holding in *Jurek* was

> guided by recognition that the inquiry mandated by Texas law does not require resort to medical experts."

Id.

It bears emphasis that the import of Petitioner's position, combined with the holding in *Estelle v. Smith*, is to bar the prosecution from ever presenting psychiatric testimony at the punishment phase of Texas capital trials. Under *Estelle v. Smith*, the state cannot compel the defendant to submit to a psychiatric examination for the purpose of assessing his future dangerousness, possibly even where the defendant himself presents such testimony. *Estelle v. Smith*, 451 U.S. at 466 n.10, 468, 472. And if a mental health professional cannot testify upon the basis of hypothetical questions, "we would be giving the defendant the right to prevent any and all psychiatric testimony on the issue of dangerousness except psychiatric testimony in his own favor." *Barefoot v. Estelle*, 697 F.2d at 598; JA 22.

B. Expert Predictions of Future Dangerousness are Reliable in Cases Such as Petitioner's.

Respondent recognizes the special need for reliability of evidence presented at the punishment phase of a capital trial. *E.g., Green v. Georgia*, 442 U.S. 95 (1979); *Gardner v. Florida*, 430 U.S. 349 (1977); *Gregg v. Georgia*, 428 U.S. 153 (1976). [6] Based upon evidence presented at the evidentiary hearing in district court, both the district court and the court of appeals found that psychiatric predictions of future dangerousness are reliable under circumstances presented in this case. This Court has no basis to hold such findings clearly er-

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6. The holding in these cases provide scant support for Petitioner. In Green, important evidence was withheld from the jury's consideration. In Gardner, the defendant was deprived of any opportunity to confront or rebut a confidential pre-sentence investigation report. Similarly, in *Holloway v. State*, 613 S.W.2d 497 (Tex.Crim.App. 1981)(*en banc*), the defendant was effectively deprived of any opportunity to rebut the hearsay basis of an expert's non-hypothetical testimony. In this case, the complete foundation of the expert hypothetical testimony was revealed to the jury; the defense was unfettered in its cross-examination, and was given every opportunity to present impeaching and rebuttal evidence.

roneous under Rule 52, Federal Rules of Appellate Procedure. [7]

The fallacy in Petitioner's position is apparent. Studies attempting to predict future behavior generally and future dangerousness specifically have frequently been unsuccessful. Many of these studies were discussed at the evidentiary hearing. [8] (R. 194-204). It has indeed proven difficult to predict future dangerousness among any segment of the population that does not have a repetitive pervasive history of past violence. [9] The American Psychiatric Association recognized this distinction years ago in its amicus curiae brief filed in this Court in *Estelle v. Smith*, 451 U.S. 454 (1981):

> "In some circumstances, of course, a clinician might be fairly confident that violent behavior would recur, as for example where a parent's past behavior clearly and repetitively evidences physical abuse of his or her children. But, as the Task Force noted, the relatively high degree of reliability in these cases is a function of knowing that base rate of such behavior that is, *the rate of repetitive past violent acts* — is very high for the person under scrutiny." (emphasis added)

Amicus curiae brief of American Psychiatric Association in *Estelle v. Smith*, No. 79-1127, at 13.

7. Cf *Buttrum v. Georgia*, _____U.S._____, 103 S.Ct. 801, 802 (1983), in which Mr. Justice Marshall dissented to the denial of certiorari and stated, "It is well recognized that predictions of violent behavior are generally unreliable even under the best of circumstances." Even so, Mr. Justice Marshall would have granted certiorari because the only testimony presented by the prosecution at the penalty stage of trial was non-hypothetical expert testimony "that was based in substantial part on hearsay statements that were not in evidence ... and were not subject to cross-examination." Id. The testimony in this case suffers none of these defects.

8. *E.g.*, Steadman & Cocozza, "The Dangerousness Standard and Psychiatry: A Cross National Issue in the Social Control of the Mentally Ill." (1980).

9. This same difficulty is apparent in the studies discussed in J. Cocozza & H. Steadman, "The Failure of Psychiatric Predictions of Dangerousness: Clear and Convincing Evidence," 29 Rutgers L. Rev. 1084 (1976), relied upon by Petitioner.

This view was echoed at the evidentiary hearing. The leading thinker in this field was conceded to be Professor John Monahan and the leading work, Monahan's monograph, *The Clinical Prediction of Violent Behavior* (1981). Monahan states repeatedly in that work that where there are repetitive past acts of violence, prediction of future violent behavior becomes increasingly more reliable. In his preface, Monahan wrote:

> "At several points in its gestation, *The Clinical Prediction of Violent Behavior* had a subtitle. When I was beginning the monograph, it was 'Why You Can't Do It.' About half way through writing it, I changed the subtitle to 'How To Do It And Why You Shouldn't.' By the time I was finished, I was toying with 'How To Do It And When To Do It.' The development of my thinking on the prediction of violence is reflected quite well in these changes: from an empirical distaste for the task, to an ethical aversion to engaging in it, to a reluctant concession that there may be circumstances in which prediction is empirically possibly and ethically appropriate."

The Clinical Prediction of Violent Behavior at v.

Those circumstances include persons such as Petitioner:

> "[T]here is a growing body of empirical evidence suggesting that, for the small group of *habitually violent persons*, the probability of future violence is raised considerably."

(emphasis in original) *Id.* at 14-15. Moreover, "If there is one finding that overshadows all others in the area of prediction, it is that the probability of future crime increases with each prior criminal act." *Id.* at 71.

Finally, Monahan wrote:

> "If the base rate of violent behavior in a given population is very low, prediction becomes an extremely difficult task. As Megargee (1976, p. 18) has it, '(m)ental health professionals should limit themselves to predicting dangerous behavior in high base-rate populations such as those who have already engaged in repeated violence."

Id. at 87. Thus, the plethora of studies purporting to

prove that future violence cannot be reliably predicted have failed to select as a sample persons with high rates of past repetitive violent behavior. [10] As the district court found:

> "The majority of psychiatric experts agree that where there is a pattern of repetitive assaultive and violent conduct, the accuracy of psychiatric predictions of future dangerousness dramatically rises. The accuracy of this conclusion is reaffirmed by the expert medical testimony in this case at the evidentiary hearing. Dr. George Parker, a psychologist, testified for Respondent that professional literature indicates that predicting future dangerousness among random mental patients or even felons generally is not terribly accurate. The prediction of future dangerousness, however, becomes easier as the pattern and history of violence becomes more repetitively persuasive."

(JA 13).

This finding was upheld on appeal by the Fifth Circuit:

> "The evidence before the federal district court supported its conclusion that the accuracy of psychiatric predictions of future dangerousness dramatically rises where there has been a pattern of repetitive assaultive and violent conduct. The majority of psychiatric experts accept that view."

Barefoot v. Estelle, 697 F.2d at 596; JA 20.

The facts of the hypothetical question presented such a history. It is shown first through the extensive testimony from witnesses in numerous communities in

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10. Two studies discussed at the evidentiary hearing (R. 197, 201) as more successfully predicting future violence by virtue of selection of such a pool sample are Shah, "Dangerousness: A Paradigm for Exploring Some Issues in Law and Psychology," 33 Am. Psych. 224 (1978), and Rofman, Askinazi, & Fant, "The Prediction of Dangerous Behavior in Emergency Civil Committment," 137 Am.J.Psych. 9 (1980). Another, Steadman, Cocozza & Melick, "Explaining the Increased Crime Rate of Mental Patients: The Changing Clientele of State Hospitals," 135 Am.J.Psych. 816 (1978), is cited in support of this identical proposition in the amicus curiae brief at 14-15 n.9 filed by the American Psychiatric Association in this case.

five states that Petitioner's reputation was bad for being a peaceful and law abiding citizen, a reputation that can only evince repeated, widespread acts of criminal violence. His criminal history contained evidence of acts of violence or potential violence, such as unlawfully carrying illegal weapons. The history is accentuated by the circumstances of the crime itself, involving arson, attempted robbery and murder.

Accordingly, it is not surprising that all four experts at the federal evidentiary hearing comfortably predicted that Petitioner would continue to commit future acts of violence posing a danger to society. Their certainty ranged from somewhat less than ninety percent [11] to not quite so high as one hundred percent. Indeed, in Professor Dix's article heavily relied upon by Petitioner, he stated that an antisocial sociopath is "aggressively hostile toward the established mores of the community and often works out his hostility by taking what he wants when he wants it, without regard for his victim," G. Dix, "The Death Penalty, Dangerousness, Psychiatric Testimony, and Professional Ethics," 5 Am.J.Crim.Law 151, 186-88 (1977), *citing* Kozel, Boucher, and Garofalo, "The Diagnosis and Treatment of Dangerousness," 18 Crim. & Delinq. J. 371, 380 (1972).

C. The Probative Value of the Expert Testimony in Petitioner's Case was not Outweighed by any Prejudicial Impact.

Petitioner and the American Psychiatric Association as *amicus curiae* also argue that the prejudicial impact of such testimony, presumably even assuming its reliability, outweighs it probative value because it is impossible to cross-examine effectively psychiatric experts. This argument is meritless. There are numerous texts upon the proper modes of cross-examination of ex-

11. One commentator has suggested that psychiatric testimony must be at least approximately ninety percent certain to support a verdict where the applicable evidentiary standard requires proof beyond a reasonable doubt. Brooks, "The Dangerous Patient: Legal Aspects," Feb. 24, 1976 (paper presented at the New York School of Psychiatry's Law and Public Policy Workshop, Poughkeepsie, N.Y.), cited in *Cocozza & Steadman*, supra, at 1084 n.1; Stone, "Comment," 132 Am.J.Psych. 829, 831 (1975).

pert witnesses; all apply equally to the kind of expert testimony presented in this case. *See, e.g*, D. Schwartz, "The Proper Use of the Psychiatric Expert", in *Scientific and Expert Evidence*, (ed. by E. Imwinklerid, 2d ed. 1981) at 1219, 1237-45. Indeed, virtually every criticism of such expert testimony set forth in the briefs of Petitioner and the various *amici curiae* either was or could have been presented at trial in Petitioner's case.

The view has also been expressed that it is impossible to present effective rebuttal testimony where the nature of such rebuttal testimony would not be that the prosecution's experts have erred in their diagnosis, but that no such proper diagnosis is medically possible. Respondent is mystified by this criticism. It would seem much easier, not more difficult, to persuade a jury that expert testimony is not credible where the contrary evidence shows not merely that the experts' testimony is wrong, but, as Professor Dix has suggested, that it stands upon the brink of quackery. G. Dix, "The Death Penalty, 'Dangerousness,' Psychiatric Testimony and Professional Ethics," 5 Am.J.Crim.L. 151, 172 (1977).

Petitioner is equally wrong in stating that he could not have impeached or rebutted the experts' testimony by showing "that Barefoot was married, had children, loved his family and they him, when to church, graduated from high school or had friends." Brief for Petitioner at 38. These are precisely the sorts of social institutional ties that both experts at trial testified would militate against their opinion (SF 2092-93, 2097-99, 2128-29). Petitioner, however, presented no such evidence, presumably because it did not exist, and so was unable to impeach the experts upon this basis. Thus, Petitioner had every opportunity to present in this context all of the mitigating evidence that he now erroneously asserts he could not present.

Petitioner relies heavily upon *People v. Murtishaw*, 631 P. 2d 446 (Calif. 1981)(*en banc*), as supporting his position. In fact, it supports Respondent's. First, the California Supreme Court recognized the validity of predictions of future dangerousness in cases such as Petitioner's:

> A reliable prediction might also be conceivable if the defendant had exhibited a long-continued pattern of

> criminal violence such that any knowledgeable psychiatrist would anticipate future violence.

People v. Murtishaw, 631 P.2d at 470. Second, the court found that the prejudicial impact of such testimony outweighed its probative value under the California statutory scheme, where a determination of future dangerousness "is at best only marginally relevant to the task at hand." *Id.* at 469. Under the Texas statutory scheme, which is quite different, such testimony is highly relevant to the special issues the jury must determine. [12]

Finally, the court was willing to find prejudicial error where the "jury deliberated two full days before deciding on the death penalty, suggesting that the issue of penalty was close." *Id.* at 471. The jury in Petitioner's trial deliberated at most one hour before returning a verdict of death.

Accordingly, there is no good reason to treat the expert testimony in this case differently from expert testimony in other cases. There is no reason to depart from the well recognized rule that the use of expert testimony is ordinarily a matter of state evidentiary law. J. Wigmore, Treatise on Anglo-American System of Evidence in Trials at Common Law, §6e (3d ed. 1940). Under the Federal Rules of Evidence, admission of expert testimony is governed by R. 701 *et seq.*, Federal Rules of Evidence. The annotations to that rule contain extremely few reversals, even on direct appeal, for erroneously admitted expert testimony. It follows that a finding of constitutional error at a state trial upon the same basis should be even more difficult. As the district court succinctly stated:

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12. Respondent is puzzled by Petitioner's emphasis upon the special importance of future dangerousness in the Texas statutory scheme as compared to those of other jurisdictions. Brief for Petitioner at 31-34. This importance proves the relevance and probative value of expert testimony upon future dangerousness and increases the degree of prejudice Petitioner must show in order to exclude such testimony.

[I]t is a fundamental premise of our entire system of criminal jurisprudence that the purpose of the jury is to sort out the true testimony from the false, the important matters from the unimportant matters, and, when called upon to do so, to give greater credence to one party's expert witnesses than another's. Such matters occur routinely in the American judicial system, both civil and criminal. If the state's psychiatrists at trial erred in being over confident as to their diagnosis of Petitioner, then Petitioner should have presented impeaching evidence or rebuttal testimony.

(JA 14).

CONCLUSION

For these reasons, Respondent respectfully prays that the judgment of the United States Court of Appeals for the Fifth Circuit be affirmed.

Respectfully submitted,

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No. 82-6080

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

THOMAS A. BAREFOOT, *Petitioner*,

v.

W. J. ESTELLE, JR., DIRECTOR
TEXAS DEPARTMENT OF CORRECTIONS, *Respondent*.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF FOR PETITIONER

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SUMMARY OF ARGUMENTS

Respondent's claim that the petitioner was not deprived of due process of law by the state's use of hypothetical questions posed to expert psychiatric witnesses at the punishment phase of his trial is based upon the specious argument, adopted without examination by the district court and the court of appeals, that "the import of Petitioner's position, combined with the holding in *Estelle* v. *Smith*, is to bar the prosecution from ever presenting psychiatric testimony at the punishment phase of Texas capital murder trials. Under *Estelle* v. *Smith*, [451 U.S. 454 (1981)] the state cannot compel the defendant to submit to a psychiatric examination for the purpose of assessing his future dangerousness, *possibly even where the defendant himself presents such testimony. Estelle* v. *Smith*, 451 U.S. at 466, n.10, 468, 472. And if a mental health professional cannot testify upon the basis of a hypothetical question 'we would be giving the defendant the right to prevent any and all psychiatric testimony on the issue of dangerousness except psychiatric testimony in his own favor.' *Barefoot* v. *Estelle*, 697 F.2d at 598." (Respondent's brief at page 43).

This basic claim presupposes the validity of his second argument, that such testimony is reliable, and the collateral assertions that (1) the reliability of the evidence outweighs its prejudicial impact upon the jury, or (2), the unreliability and inaccuracy of the predictions affect their weight rather than their admissibility.

NECESSITY FOR PSYCHIATRIC TESTIMONY ON THE ISSUE OF FUTURE DANGEROUSNESS IN THE ASSESSMENT OF THE DEATH PENALTY

Texas, Oklahoma, Washington, Maryland, Idaho and Virginia are the only states that utilize the issue of future dangerousness in the assessment of the death penalty.

OKLAHOMA

Oklahoma Statutes Title 21, Section 701.12 lists eight aggravating circumstances to be considered by the jury in a

capital case. The seventh of these is "The existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society."

While no mitigating factors are specifically enumerated, Section 701.10 provides that "evidence may be presented as to any mitigating circumstances," and Section 701.11 excludes the death penalty "if it is found that any [statutory] circumstance is outweighted by the finding of one or more mitigating circumstance."

Thus, even though the jury finds that a defendant will probably commit criminal acts of violence that would constitute a continuing threat to society, he could still receive a life sentence if the jury also found that this aggravating circumstance was outweighed by the finding of one or more mitigating circumstance.

WASHINGTON

RCW 10.95.020 specifies ten aggravating circumstances which elevate first degree murder to aggravated first degree murder. None of these circumstances involve the issue of future dangerousness.

A defendant who is convicted of aggravated first degree murder is sentenced to life imprisonment without parole unless, at a special sentencing proceeding held under RCW 10.95.050, "the trier of facts finds that there are not sufficient mitigating circumstances to merit leniency," in which case he is sentenced to death. RCW 10.95.030. The jury is required to answer one question; "Having in mind the crime of which the defendant is found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?" RCW 10.95.060(4).

In answering this question the jury may consider "any relevant factors, including but not limited to the eight specifically named in the statute. Included in the statutory factors is "Whether there is a likelihood that the defendant will pose a danger to others in the future." RCW 10.95.070(8).

IDAHO

Punishment for murder of the first degree is either death or life imprisonment. Idaho Code 18-4004. The court may not impose a sentence of death unless it finds at least one statutory aggravating circumstance. Where the court finds such aggravating circumstance the defendant shall be sentenced to death unless the court finds that mitigating circumstances which may be presented outweigh the gravity of any aggravating circumstance found and make imposition of death unjust. Idaho Code 19-2515. No mitigating circumstances are prescribed by statute. Among the aggravating factors listed is; "The defendant, by prior conduct or conduct in the commission of the murder at hand, has exhibited a propensity to commit murder which will probably constitute a continuing threat to society." Idaho Code 19-2515-(f)(8).

The Idaho court held, in *State* v. *Osborn*, 631 P.2d 187 (1981), that since it was unconstitutional for a legislature to limit the sentencing body's consideration of mitigating factors to those specified in a statute, the failure of the Idaho statute to specify mitigating factors demonstrated its constitutionality.

VIRGINIA

The Virginia Code, Section 18.2-31 specifies six capital murder offenses. The conditions for imposition of a death sentence are contained in Code Section 19.2-264.2 (1) and (2). The sentencer must find, (1) after consideration of the past criminal record of convictions of the defendant, that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society or that his conduct is committing the offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim; and (2) recommend that the penalty of death be imposed.

Code Section 19.2-264.4B, governing the sentencing proceeding, provides that "Facts in mitigation of evidence may include but shall not be limited to the following: (i) The defend-

ant has no significant history of prior criminal activity, or (ii) the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance or (iii) the victim was a participant in the defendant's conduct or consented to the act, or (iv) at the time of the commission of the capital felony, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was significantly impaired; or (v) the age of the defendant at the time of the commission of the capital offense.

"The penalty of death shall not be imposed unless the Commonwealth shall prove beyond a reasonable doubt that there is a probability based upon evidence of the prior history of the defendant or the circumstances surrounding the commission of the offense of which he is accused that he would commit criminal acts of violence that would constitute a continuing serious threat to society, or that his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim." Section 19.2-264.4(C).

Even when the Commonwealth proves either or both aggravating circumstances, the jury is at liberty, in consideration of circumstances in mitigation, to recommend a sentence of life imprisonment. *Smith* v. *Commonwealth*, 219 Va. 455, 248 S.E.2d 135 (1978), *cert den.* 441 U.S. 967 (1979).

MARYLAND

Article 27, Section 412(b), Annotated Code of Maryland, provides a penalty of either death or life imprisonment for first degree murder. Section 413(d) lists 10 aggravating circumstances. If the jury or court does not find beyond a reasonable doubt that one or more of these aggravating factors exist, the defendant receives a life sentence. Even if one or more of the aggravating circumstances are proven, the sentencer must consider whether, based upon a preponderance of the evidence, any of the mitigating circumstances listed under subsection (g) exist. One of these factors, (g)(7), is whether "It is

unlikely that the defendant will engage in further criminal activity that would constitute a continuing threat to society."

If the sentencer finds that one or more of the mitigating factors exist, it shall determine whether, by a preponderance of the evidence, the mitigating circumstances outweigh the aggravating circumstances. If they do, the sentence is life; if not, death.

TEXAS

The consensus of those jurisdictions with capital punishment statutes is that future dangerousness, per se, is not critical to the assessment of the death penalty. Even the five states that utilize the concept of future dangerousness provide that such a finding, standing alone, will not suffice to support a death sentence in the face of Eighth Amendment considerations. Each provides varying methods whereby the sentencing authority may assess life imprisonment, even though the state proves a defendant's probable future dangerousness.

The Texas statutory scheme differs fundamentally from those outlined above, despite what a plurality of this Court was led to believe in *Jurek* v. *Texas*, 428 U.S. 262 (1976). The only mitigating evidence admissible in Texas is geared solely to the issue of a defendant's future dangerousness. See Benson, *Texas Capital Sentencing Procedure After Eddings: Some Questions Regarding Constitutional Validity*, 23 South Texas L. J. 315.

The Court of Criminal Appeals clearly stated, in *Jurek* v. *State*, 552 S.W.2d 934, 939-940 (Tex.Cr.App. 1975) that:

> "In determining the likelihood that the defendant would be a continuing threat to society, the jury could consider whether the defendant had a significant criminal record. It could consider the range and severity of his prior criminal conduct. It could further look to the age of the defendant and whether or not at the time of the commission of the offense he was acting under duress or under the domination of another. It could also consider whether the defendant was under an extreme form of mental or emotional

> pressure, something less, perhaps, than insanity, but more than the emotions of the average man, however inflamed, could withstand."

One of the critical defects in the Texas procedure is that [e]vidence is deemed material only if it bears on the defendant's dangerousness within the meaning of question two [relating to the probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society] . . . The decisions . . . provide no guidance on how a jury might balance factors that mitigate the defendant's ethical blameworthiness with factors that suggest his continued dangerousness when the evidence indicates the presence of both factors." Dix, *Administration of the Texas Death Penalty Statutes: Constitutional Infirmities Related to the Prediction of Dangerousness*, 55 Tex.L.Rev 1343 (1977) and Dix, *Constitutional Validity of the Texas Capital Murder Scheme: A Continuing Question*, 43 Tex.B.J. 627 (1980).

Professor Benson noted a second fundamental defect in the Texas capital murder sentencing procedure.

> "The final and most serious problem is that a Texas jury, under the present capital sentencing scheme, cannot make a meaningful, binding response to mitigating evidence that goes beyond the scope of the three special issues, even if the trial court decides to admit such evidence . . . The trial judge has no authority to submit any other issues, regardless of the posture of the mitigating evidence he or she may have allowed to go before the jury. The jury has no authority to return any answers or other form of verdict or sentence recommndation, except the two . . . special issues, each of which must be answered simply 'yes' or 'no' without further elaboration . . . The trial court has no way to instruct the jury what to do with [mitigating] evidence and cannot submit an additional special issue under the present statutory scheme. Thus a Texas jury is effectively and completely blocked from considering such mitigating evidence in a meaningful way and thereby making a meaningful, and binding response to it." Benson, supra, at pages 329-331.

Thus, unlike the Oklahoma, Washington, Maryland, Idaho and Virginia juries, the only way that a Texas jury can grant leniency at the punishment phase of a capital murder trial is to ignore the court's instructions and return a negative answer to one of the special issues. See *Blansett* v. *State*, 556 S.W.2d 322, 327, n.6 (Tex.Cr.App. 1977).

It is against this statutory backdrop that respondent claims a ban on the use of hypothetical questions in eliciting psychiatric testimony would give a defendant the right to prevent any and all psychiatric testimony on the issue of dangerousness except psychiatric testimony in his own favor.

This Court held in *Jurek* v. *Texas*, 428 U.S. 262 (1976), that the jury is capable of predicting future dangerousness.

"[T]he inquiry necessary for the jury's resolution of the future dangerous issue is in no sense confined to the province of psychiatric experts." *Estelle* v. *Smith*, 451 U.S. 454, 473 (1981). "While in no sense disapproving the use of psychiatric testimony bearing on the issue of future dangerousness, the holding in *Jurek* was guided by recognition that the inquiry mandated by Texas law does not require resort to medical experts." *Ibid.*

Respondent argued in *Smith* v. *Estelle*, 602 F.2d 694, 704-705 (5th Cir. 1979), *aff'd sub. nom. Estelle* v. *Smith*, 451 U.S. 454 (1981), that *United State* v. *Cohen*, 530 F.2d 43 (5th Cir. 1976), *cert. den.* 429 U.S. 855 (1976), entitled the state to force "capital defendants to undergo a psychiatric examination designed to decide whether they are likely to commit violent crimes in the future," even though the defendants never use psychiatric evidence and never suggest that they might.

Rejecting this contention, the Court said, page 705:

> "The second and most important premise of *Cohen* was that if a defendant raises insanity as a defense, and introduces psychiatric testimony, 'the government will seldom have a satisfactory method of meeting defendant's proof on the issue of sanity except by the testimony of a psychiatrist it selects . . . who has had the opportunity to

> form a reliable opinion by examining the accused. [citations omitted]. At most, this rationale of *Cohen* implies that a defendant who introduces the results of a psychiatric examination at the sentencing phase of a capital trial must submit to an examination by a psychiatrist nominated by the state."

Preventing the prosecution from relying on either compelled psychiatric examinations or hypothetical questions propounded to psychiatric witnesses "will scarcely disable it from proving the defendant's dangerousness in appropriate cases . . . Moreover, the inquiry demanded by Texas's second question is not obviously a matter for psychiatrists."

None of the other five states that utilize the "future dangerousness" concept rely upon psychiatric testimony to secure a death sentence. None of these states have appeared as amici in the present proceeding on this issue, although both Idaho and Virginia have joined respondent as amici on the "standards" issue.

While both *Coker* v. *Georgia*, 433 U.S. 584 (1977), and *Enmund* v. *Florida*, ___ U.S. ___, 73 L.Ed2d 1140 (1982), related to excessive punishment under the Eighth Amendment, their rationale is applicable to the issue of hypothetical psychiatric testimony, assuming that such evidence is reliable, or, if unreliable, that its use goes to weight and not admissibility.

In both *Coker* and *Enmund* this Court looked to the historical development of the punishment at issue, determined that it was presently sanctioned by a small minority of the states, and concluded that it had been largely rejected by society.

A similar analysis of the *method* used by Texas to obtain a death sentence—one uniformly rejected by every other state, and by the psychiatric profession itself—results not only in an unreliable punishment verdict but also in excessive punishment.

The future dangerousness issue as utilized in Texas, where all mitigating evidence that is not relevant to the issue, even

though directly bearing upon the possibility of leniency, is inadmissible, is peculiarly designed to eliminate the jury's consideration of even this limited mitigation where the state presents "expert" testimony that death is the only proper sentence for the defendant on trial.

THE PSYCHIATRIC AND PSYCHOLOGICAL TESTIMONY IN BAREFOOT'S TRIAL IS NOTHING MORE THAN FANTASTIC SPECULATION, IS UNRELIABLE, AND AS SUCH, INADMISSIBLE IN TEXAS CAPITAL PUNISHMENT HEARINGS

Respondent's brief reviewing the evidentiary hearing, and his interpretation of positions stated in the Amicus brief of American Psychiatric Association, (hereafter Amicus APA) and representations of the import of certain scientific studies on predicting future dangerousness by mental health experts, misstates the record and the studies.

Respondent finally concedes that at the evidentiary hearing, in 86 pages of testimony by Dr. Fason and the 41 pages by Dr. Dickerson, both *refused to diagnose* Barefoot on the basis of the same hypothetical presented to Grigson and Holbrook at the punishment phase of Barefoot's trial. At most, both might, for the purposes of the hearing, give an *impression* that the behavior described was not inconsistent with behavior observed in a personality disorder commonly known as "antisocial personality". Fason and Dickerson in no wise voiced accord with the diagnosis and predictions of any of Respondent's experts at the evidentiary hearing or at Barefoot's trial. A fair review of the habeas record, the summary of same in Petitioner's original brief and briefs of the American Psychiatric Association and NAACP Legal Defense and Educational Fund, Inc., emphasizes the glaring misstatements and misrepresentations of Respondent to the courts below which were adopted by both courts below. In spite of his concession, *now*, which is inescapable, that Barefoot's experts at the habeas hearing refused to make a diagnosis of Barefoot because they testified that to do so under the circumstances [of

[the hypothetical] was *unreliable*, *unethical*, and *speculation*, Respondent persists in attempting to mislead this Court by stating that all experts agreed that Barefoot would continue to commit future acts of violence posing a danger to society (Respondent's Brief at 47) Respondent asserts "Accordingly, it is not surprising that all four experts at the federal evidentiary hearing comfortably predicted that Petitioner would continue to commit future acts of violence posing a danger to society. Not so.

Dr. Fason testified that on the basis of the hypothetical, an educated guess or impression *only* was possible. He stated that as a psychiatrist he could not testify that there was no cure for a sociopathic condition and *could not testify that a defendant sentenced to life in prison would present a danger to other inmates* (T. 46-47) The basis for any impression under the circumstances of the hypothetical, could not approach a level of reliability of reasonable medical probability required of expert medical opinions (T 44). The data presented in the hypothetical was insufficient for any responsible competent physician to arrive at a diagnosis reliably (T 54).

Dr. Dickerson compared the chances of a correct medical diagnosis under the data presented to betting on a horse race (T 116). He emphasized that *medical experts are incapable of predicting long-term future dangerousness* (T. 95, 100, 108) *and that expert predictions were wrong, or false, two out of three times* (T 108). To whatever degree of certainty, even 100%, a prediction of future dangerousness is predicted by a mental health expert, Dickerson acknowledged that that prediction was wrong over 65% of the time. (T 118).

Both Fason and Dickerson emphasized that other mental disorders, if any existed, could not be ruled out on the basis of the information and that a diagnosis of any kind, particularly, "antisocial personality", made without any examination or evaluation of the subject was incompetent. On the same basis, for a mental health professional to disguise his personal philosophy that all persons he claims are sociopaths must die, with a

mantle of expertise where the scientific community almost unanimously agrees that such predictions have as little reliability as reading tea leaves, is outright quackery.

Respondent's expert, Parker, conceded that a jury could be mislead by an expert's certain prediction of future violence (T 220, 221). Even Dr. Koons personally had never diagnosed a defendant in a capital case as sociopath based solely on a hypothetical question and knew of no others than Grigson and Holbrook who had (T 237). Dr. Coons agreed that his diagnosis could be *confirmed* with more information than presented in the hypothetical (T 231, 242). One might infer that his diagnosis was "not so comfortable."

That Respondent finds support in the California Supreme Court's opinion in *People* v. *Murtishaw*, 631 P.2d 446 (1981) demonstrates the extent of his misstatements when he suggests that the California Court recognized the validity of predictions of future dangerousness and that the prejudicial impact of such testimony outweighed its probative value under the California statute where such a determination was marginally relevant (Respondent's brief at 48, 49). In fact, the Murtishaw court held:

> "Arguably the risk that defendant will commit future violent acts is a matter 'relevant to aggravation' which reflects on defendant's future 'character' and 'mental condition.' In view of the *unreliability* of that forecast, however, the probative value of that testimony is far outweighed by its prejudicial impact. *One can image few matters more prejudicial at the penalty trial than testimony from an established and credentialed expert that defendant, if sentenced to life without possibility of parole, would be likely to kill again.* Such testimony implants in the mind of each juror the message that the death penalty, promptly carried into effect, is the only way to protect society from the defendant, the only way to forstall another instance in which defendant responds to frustration with deadly violence." (Id at 470)

The Murtishaw court, citing Dix, *Participation by Mental Health Professional in Capital Murder Sentencing* (1978) 1 Internat. J. of L. & Psych. 283, 397, relied on Dix's reasoning:

> "A trier of fact offered the opportunity to base a decision on the affirmative assertion by an apparently well-qualified professional that a defendant's execution is essential to saving the lives of others is likely to take that opportunity rather than face the difficult task of evaluating the offender's ethical culpability . . . [Such predictions tend] to discourage the sort of individualization that the Supreme Court has demanded of death penalty procedures." (Id. 470)

Although the California statute does not list as a specific aggravating circumstance that a defendant be found likely to commit future acts of violence, the Court explained at great length, that relevant or not to the statute, the unreliability of such predictions [based on extensive studies cited] were such as to be extremely prejudicial to the defendant. Central to the *Murtishaw* holding that psychiatric predictions of dangerousness are *inadmissible* is the court's recognition of the need for exacting standards of accuracy and reliability given the severity and finality of the death sentence. Garrett, *People* v. *Murtishaw: Applying the Frye Test to Psychiatric Predictions of Dangerousness in Capital Cases*, 70 Cal.L.R.1069 (1982). "[e]vidence which is barely reliable enough to satisfy a civil judgment or a limited commitment is not reliable enough to utilize in determining whether a man should be executed." *Murtishaw*, supra, at 771. In *Murtishaw*, there had been some form of examination and even then, the California court held such predictions unreliable and inadmissible. In Barefoot, there was not any sort of medical basis for the *expertise* paraded for the jury's reasoned consideration. That the Barefoot jury assessed death in less than an hour on the basis of this unreliable evidence, underscores the need for this Court prohibit the use of Barefoot-type *expert* opinions in all capital cases ". . . the penalty of death is different from a sentence of imprisonment, however long . . . Because of that qualitative difference, there is a corresponding difference in the need for

reliability in the determination that death is the appropriate punishment in a specific case." *Woodson* v. *North Carolina*, 428 U.S. 280(1976); *Gardner* v. *Florida*, 430 U.S. 349 (1977).

Respondent selectively uses portions of scientific studies on the prediction of future violent behavior as support for his position. For example, Respondent relies on the work of John Monahan, *The Clinical Prediction of Violent Behavior* (1981) to sustain the reliability of predictions of future violent behavior, suggesting that Monahan approved and thought ethical that mental health experts predict future dangerousness (Respondent's brief at 45). The American Psychiatric Association in reviewing the same study in their amicus brief (APA Brief at 13) made these observations:

> "A more recent monograph [Monahan's study] again found that *psychiatrists were more often wrong than right in predicting violent behavior* over an extended period of time . . . [reviewing all major research published since 1970, the study] . . . concluded that no psychiatric procedures or techniques had succeeded in reducing the high rate of 'false positive' predictions—that is, affirmative predictions of future violent behavior that are subsequently proven erroneous. [quoting Monahan, at 49] . . . "it would be fair to conclude that the best clinical research currently in existence indicates that psychiatrists and psychologists are accurate *in no more than one out of three predictions of violent behavior* . . ." (emphasis added)

Petitioner's view at the evidentiary hearing was that two of three such predictions by mental health experts were unreliable, and erroneous (T, 97, 98, 105), and should therefore be inadmissible in Texas capital sentencing hearings, particularly where there has been no form of medical or psychological examination of the subject. Although Monohan viewed a history of repeated acts of violence as a *better* indicator of the expection of future violence, such in no wise increased, to any significant extent, the reliability of expert predictions.

Respondent speculates that studies concluding that future violence cannot be reliably predicted by *experts* fail to use as a sample population, persons with high rates of past repetitive

violent behavior, and suggests that Amicus APA shares this view (Respondent's brief at 46, footnote 10) when in fact, Amicus says:

> ". . . *psychiatrists are unable to predict future violent behavior* . . . this Court's decision in *Jurek*, supra, rejecting the vagueness challenge [does not mean that such predictions can never be made] . . . What we do contend, however, is that the long-term prediction of future dangerousness is an essentially lay determination . . . based not on the diagnoses and opinions of medical experts, but on the basis of predictive statistical or actuarial information . . . fundamentally nonmedical in nature.
>
> ". . . the most reliable—although by no means dispositive—predictors of long-term future violent behavior are factors *having nothing to do with psychiatric disorders or illnesses*" (Amicus APA, at 14).

Respondent contends that the high base rate of repetitive past violent acts increases the reliability of predicting the probability of future violent criminal acts. (Respondent's Brief at 21) Respondent then proposes that the bad reputation testimony in Barefoot's trial "can only evince repeated, widespread acts of criminal violence . . . such as unlawfully carrying illegal weapons." (Respondent's Brief at 47) Out of the presence of the jury, Barefoot proved that each character witness presented by the State based his opinion that Barefoot had a bad reputation as a peaceful and law abiding citizen on personal contact with Barefoot in relation to the arrests and convictions in evidence before the jury and no other "criminal acts of violence to other persons" (R.1900-1963) In Texas, reputation testimony is nothing more than hearsay, or gossip which according to Dr. Fason, has no diagnostic significance (T 23). Surely, this Court will not consider bad reputation as the standard of prior criminal acts of violence upon which any person, lay or expert can predict future violence, constituting a future danger to society, mandating death.

This Court could not have envisioned the use of gossip and hearsay as the basis for reliable psychiatric predictions of future dangerousness when the Court in *Jurek* v. *Texas*, 428

U.S. 262 (1976) and *Estelle* v. *Smith*, 451 U.S. 454 (1981), did not rule out the *proper* use of psychiatric evidence at the punishment hearing in a Texas capital case.

In sustaining the Texas capital sentencing statute in *Jurek*, supra, a plurality of this Court held that the Texas Court of Criminal Appeals intended that a jury could consider all evidence relevant to sentencing, and that predictions of future behavior was a task not uncommon, but used daily in the criminal justice system. In *Jurek*, supra, this Court used as examples, such decisions as whether to release a defendant to bail. That decision is not based solely on a determination of future behavior, dangerousness or non-dangerousness, but takes into consideration the presumption of innocence, the right to bail, the nature of the offense charged, the prior criminal history of the accused and the practicalities of overcrowded conditions in jails. A sentencing authority also doesn't determine appropriate sentencing based solely on future conduct, but considers that the punishment be proportional to the nature of the offense with considerations of the individual offender. Parole authorities evaluate prior criminal history, the offense for which one is incarcerated, the "good time" accumulated, and support systems in the free world when considering whether to release a prisoner. The intent of *Jurek*, supra, was broader than has been applied in practice. In Texas, the fact finders' discretion in considering all evidence relevant to sentencing is removed when an *expert* testifies that a capital murderer is a sociopath, of the most severe type, untreatable, who will 100% certainly and absolutely commit future acts of criminal violence constituting a threat to society both in and out of the penitentiary. Unless this Court limits the use of *Barefoot type* predictions, based on fantastic speculation, a dangerous precedent will be set, not only in Texas, but in every state where death is considered an 'appropriate' penalty. The fact-finders' role is necessarily impacted by such unreliable testimony, presented in a way to give no alternative except an affirmative answer to the ultimate issue. Evidence of family history and associations, prior or current mental disorders, use of intoxicants at or near the time of the offense, age, etc., carry

no weight for the factfinder in predicting future dangerousness when an expert predicts with any degree of certainty a defendant's future of criminal violence to all other persons in society.

In *Eddings* v. *Oklahoma*, 71 L.Ed.2d 1 (1982) Chief Justice Burger, writing for the dissent, pointed out the unreliability of the psychiatric, psychological, and sociological evidence in Eddings case because of the limited opportunity to test and observe Eddings, the "atmosphere" of the testing and speculation from the results. The majority, in *Eddings*, supra, based their opinion on the failure of the trial court to consider such evidence, as a matter of law, in mitigation of punishment, and did not determine whether the evidence offered was reliable. Chief Justice Burger, although noting it immaterial to a correct decision, specifically addressed the issue of reliability of such evidence:

> ". . . Dr. Gagliano, a psychiatrist, opined on the basis of a one-hour interview—during which petitioner's attorney was present and refused to allow questioning about petitioner's 'mental status' on the day of the shooting—that at the time petitioner pulled the trigger, 'he acted as a seven year old seeking revenge and rebellion' against his stepfather, a policeman. Dr. Gagliano was also willing to state categorically on the basis of this single interview, and without reference to the results of the psychological testing of Eddings, that *Eddings was 'preordained' to commit the murder* from the time his parents were divorced, when he was five. *This sort of 'determinist' approach is rejected by an overwhelming majority of psychiatrists.* (*Eddings*, supra, at 16, footnote 4)

Chief Justice Burger characterized Gagliano's opinion concerning Eddings' dissociation at the time of the crime as rather *'fantastic speculation'* (*Eddings*, supra, footnote 10 in dissenting opinion) The use of the expert diagnostic and predictive testimony in Barefoot was just the sort of *determinist* approach criticized in *Eddings*, supra, and at best, fantastic speculation.

Barefoot's attempts to impeach, cross examine, and argue against the reliability of the experts' opinion and predictions

are characterized as vigorous (Respondent's brief at 15) but did not, as Respondent contends, afford Barefoot the constitutional protections mandated by this Court.

Even if Barefoot had called mental health experts on his own in an attempt to counter or rebut the devastating testimony of Grigson and Holbrook, and if Barefoot's experts challenged the State's witnesses testimony as inherently unreliable and unethical, "[s]ince members of the jury will have had little, if any, previous experience in sentencing, they are unlikely to be skilled in dealing with the information they are given." *Gregg* v. *Georgia*, 428 U.S. 153 (1976). In its brief, the American Psychiatric Association noted:

> "Nor can cross-examination or rebuttal experts limit or remove this prejudice. Because most psychiatrists do not believe they possess the expertise to make long-term predictions of dangerousness, they cannot dispute the conclusions of the few who do. Instead of offering a countervailing pediction of non-dangerousness in a particular case, they (or defense counsel on cross-examination) can only advance a challenge to the asserted 'expertise' of the prosecution psychiatrist. The likely result, therefore, is that the jury will hear not the traditional battle of expert conclusions, but only a dispute over one expert's ability to reach the conclusion that he did. In that situation, it remains all too easy for the jury to avoid its difficult sentencing decision by seeking refuge in the only "medical" conclusion concerning dangerousness that is before it. (Amicus APA, at 18)

It is unreasonable to believe that the jury chose to discard properly guided by the trial court's instructions to take into consideration all of the evidence submitted. (JA 4). The trial court's further instruction to give such weight and value as you believe it should have to the testimony of certain of the witnesses who *purport to be skilled in their line of endeavor and who are known in law as expert witnesses* (JA 4) guided the jury into affirmative answers and a sentence of death.

The remote control diagnoses of Barefoot by Grigson and Holbrook climaxing in their absolutely certain prediction of future dangerousness is no less *fantastic speculation*, particu-

larly where there has been *no* examination or evaluation of the subject. The use of such testimony cannot be reliable evidence where the overwhelming majority of professionals in the field of expertise [mental health] are of the opinion that such predictions, under the circumstances of Barefoot's case, cannot be made with even reasonably accuracy and that even under the best of conditions, psychiatric predictions of long-term future dangerousness are wrong in at least two out of every three cases. The unreliability of such evidence goes to the admissibility, not the weight of such evidence. In *Eddings*, supra, the majority noted that "Lockett required the sentencer to listen" (at 876, n.10). If the lower court's ruling in Barefoot is sustained, this Court will be overturning the mandate for the sentencer to listen, and consider the individualized factors in considering life over death. The Barefoot sentencer must execute or set upon society an individual devoid of conscience, 100% certain to commit future acts of violence. The expert speculation in Barefoot cannot be sustained where it so distorted the factfinders' role to the extent that deprived Barefoot of the protections provided by the Sixth, Eighth and Fourteenth Amendments of the Constitution of the United States. The use of same requires this Court vacate Barefoot's death sentence.

CONCLUSION

In capital punishment jurisdictions, Texas stands alone in the use of the prediction of future dangerousness as the critical issue in assessing death. Every other statute provides for the sentencer to consider a broad range of mitigating circumstances in determining whether leniency is merited, and a life spared. Evidence of the individualized character of the Texas capital defendant is only relevant to one special issues presented "whether the defendant will commit criminal acts of violence that will constitute a continuing threat to society." In Texas the jury can only answer "yes" or "no." That limitation on consideration of evidence in mitigation of punishment violates this Court's mandate in the face of Eighth and Four-

teenth Amendment considerations not forseen in *Jurek*, and not addressed in *Smith*.

When that ultimate issue is affirmatively answered by a witness purporting to have expertise in predicting future dangerousness, with or without examining the defendant, the sentencer can neither consider nor justify mitigation. Death is mandated.

In referring to the use of hypotheticals much like Barefoot's, and the prediction of future dangerousness by 'experts,' a federal district court said:

> "The prevailing view among psychiatrists and professional psychiatric associations, a view to which this court subscribes, is that to the extent that long-range dangerousness can be predicted (a view not accepted by the psychiatric community) an opinion as to an individual's future penchant for violence which does not follow extensive examination and is not based on a great deal of complex and in-depth information, is not a professional, but a lay opinion. However, when this lay opinion is proffered by a witness bearing the title of "Doctor," its impact on the jury is much greater than if it were not masquerading as something it is not." *White* v. *Estelle*, 554 F.Supp. 851 (S.D. Tex. 1982)

Scientific studies acknowledge that predictions of future dangerousness over the long-term are wrong two out of three times. Such predictions, made without extensive psychological and psychiatric evaluation and examinations have even lesser reliability. For this Court to permit an execution on the basis of the expertise used by the State at the punishment phase of Barefoot's trial, is to overturn the long line of cases in which this Court has mandated that in capital cases, death is so qualitatively different that the need for reliability is greater and the sentencer must consider the individual and all relevant evidence in determining that the execution of a human being is the only alternative and appropriate punishment. Petitioner submits that the Texas death penalty statute does not evenly apply the considerations mandated by this Court and in this case, the fact-finder was precluded from considering any

punishment except death, where the ultimate issue was answered in the guise of expertise that does not exist. The resulting mandate in Barefoot requires a reversal of this sentence and the prohibition against the admissibility of such testimony in any capital case. In view of the practical application of evidentiary rules of admissibility and relevancy since *Jurek*, the Texas statute necessarily limits consideration of all relevant mitigation evidence of the individual and cannot withstand this constitutional challenge.

Respectfully submitted,

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No. 82-6080

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

THOMAS A. BAREFOOT,
Petitioner,

v.

W. J. ESTELLE, JR., Director,
Texas Department of Corrections,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF *AMICUS CURIAE* OF THE AMERICAN BAR ASSOCIATION

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QUESTION PRESENTED

The American Bar Association will address the following question:

What is the appropriate standard for granting a stay of execution to a death-sentenced federal habeas corpus prisoner pending disposition by a federal Court of Appeals of his initial appeal.

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IN THE

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OCTOBER TERM, 1982

No. 82-6080

THOMAS A. BAREFOOT,
Petitioner,

v.

W. J. ESTELLE, JR., Director,
Texas Department of Corrections,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF *AMICUS CURIAE* OF THE AMERICAN BAR ASSOCIATION

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The American Bar Association (hereinafter ABA) is a voluntary, national membership organization of the legal profession. Its nearly 300,000 members come from every state and territory and the District of Columbia. Its constituency includes prosecutors, public defenders, private lawyers, trial and appellate judges at the state and federal levels, legislators, law professors, law enforcement and corrections personnel, law students, and a number of nonlawyer "associates" in allied fields. Since its inception over 100 years ago, the ABA has taken an active interest in the improvement of the administration of justice.

The ABA appears as *amicus curiae* in this cause to address a serious procedural question with important implications for the administration of justice in the federal courts: the proper standards governing stays of executions pending initial appeal in habeas corpus cases. We wish to make clear that we do not enter this case to support or to oppose, expressly or implicitly, a penalty of death. This Association has not formally addressed capital punishment either as a constitutional question [1] or as a social policy.

Rather, our concern is that standards governing so fundamental a procedural issue as the administration of stays pending an initial appeal in capital cases should be decided only after a careful examination of the statutory authority, the prior practice, and the policy considerations bearing on the issue. Our own examination of these matters has convinced us that the correct standard is the one set forth in the body of this brief.

Both parties have consented to the filing of this *amicus curiae* brief.

OPINIONS BELOW, JURISDICTION, AND CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

We adopt the statement of the Opinions Below, Jurisdiction, and Constitutional and Statutory Provisions Involved set forth in Petitioner's Brief.

STATEMENT OF THE CASE

Only the procedural history of this case is pertinent to the issue the ABA will address; that history is summarized below. Otherwise, the ABA adopts the Statement of the Case as set forth in Petitioner's Brief.

Petitioner Thomas Barefoot was convicted on November 21, 1978, in the 27th Judicial District Court for Bell

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[1] The constitutionality of the death penalty *vel non* has of course been resolved in *Gregg* v. *Georgia*, 428 U.S. 153, 168-187 (1976).

County, Texas, of the murder of Carl Levin, a Harker Heights, Texas, police officer. The Texas Court of Criminal Appeals affirmed petitioner's conviction and sentence, and also denied a motion for rehearing. *Barefoot* v. *State*, 596 S.W.2d 875 (Tex. Crim. App. 1980). On June 29, 1981, this Court denied a petition for a writ of certiorari. *Barefoot* v. *Texas*, 453 U.S. 913 (1981). Petitioner thereafter filed a state habeas corpus petition in the District Court for Bell County, which denied the petition without a hearing, and the Texas Court of Criminal Appeals affirmed.

Having exhausted his federal constitutional claims, petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Western District of Texas, Waco Division, raising at least four constitutional claims in his habeas petition.[2] After an evidentiary hearing, the District Court denied the petition in an order and judgment entered November 12, 1982. The District Court, at the request of the State of Texas, vacated its earlier stay of execution in an order entered December 8, 1982; however, on application of petitioner, *the District Court granted a certificate of probable cause*, pursuant to 28 U.S.C. § 2253, on December 10, 1982.

On December 20, 1982, the 27th Judicial District Court for Bell County, over petitioner's objection, entered an order scheduling petitioner's execution for January 25, 1983. Petitioner moved in the Texas Court of Criminal Appeals on December 20, 1982, to stay his execution. The Court of Criminal Appeals entered an order the next day denying the stay, but failed to notify counsel for petitioner of its ruling until two weeks later. Petitioner renewed his motion for a stay in the Court of Criminal Appeals on January 10, 1983, and that court denied the renewed motion the following day.

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[2] The petition was initially filed in the Western District of Texas, Austin Division, but was transferred to the Waco Division for filing by an order of the District Court.

Three days later, on January 14, 1983, petitioner filed an application for a stay of execution pending appeal in the United States Court of Appeals for the Fifth Circuit. The Court of Appeals scheduled oral argument on the application five days hence. The argument was originally set to be held before a panel consisting of Judges John R. Brown, Thomas M. Reavley, and E. Grady Jolly. When Judge Brown became ill on the morning of the argument, Judge Carolyn D. Randall was substituted. Judge Reavley informed counsel in open court prior to argument that Judge Randall had not seen any of the papers which had been filed. Moreover, no members of the panel had been provided by the State of Texas or by the Clerk of the District Court with either (i) the 1400-page state trial transcript or (ii) the 260-page federal habeas corpus transcript prior to argument. Nevertheless, on the day following the argument, the Court of Appeals entered a 16-page order denying a stay of execution.

Addressing the standard governing its decision whether to issue a stay, the Court of Appeals noted that it must "consider the likelihood of success" of Barefoot's appeal in making the decision whether to stay his execution, and that "[t]here should be a substantial case on the merits of any serious legal question involved in the appeal to warrant staying the decision below." Slip op. at 4. In this regard, the District Court's issuance of a certificate of probable cause should be given " 'weighty consideration' " by the Court of Appeals (slip op. at 4, quoting *Nowakowski* v. *Maroney*, 386 U.S. 542, 543 (1967) (per curiam)), but the Court of Appeals was obliged independently to assess the merits of petitioner's claims. Slip op. at 4 & n.2.

The court did consider and reject petitioner's suggestion that the grant by the District Court, pursuant to 28 U.S.C. § 2253, of a certificate of probable cause to appeal necessarily required that a stay of execution be

granted.[3] The Court of Appeals acknowledged that a similar position had been taken by three members of this Court in *Brooks* v. *Estelle*, 51 U.S.L.W. 3469 (U.S. Dec. 6, 1982) (Brennan, Marshall & Stevens, J.J., dissenting from the denial of a stay), but concluded that "since six members of the Court denied the petition for stay [in *Brooks*], this argument must have been rejected." Slip op. at 5. Finally, the Court of Appeals distinguished this case from *Nowakowski* and *Garrison* v. *Patterson*, 391 U.S. 464 (1968) (per curiam), on the ground that, because the petitioner had an opportunity to brief and argue the merits of the underlying issues, the case was controlled by *Carafas* v. *LaValle*, 391 U.S. 234 (1968). Slip op. at 5-6. In its opinion, the Court of Appeals neither mentioned nor considered the statute, 28 U.S.C. § 2251, authorizing stays of execution in habeas corpus cases.

Petitioner filed an application for a stay of execution with this Court, and the Court entered an order staying petitioner's execution, and granting certiorari to consider

> the appropriate standard for granting or denying a stay of execution pending disposition of an appeal by a federal court of appeals by a death-sentenced federal habeas corpus petitioner, and also, the issues on the appeal before the United States Court of Appeals for the Fifth Circuit. [*Barefoot* v. *Estelle*, 51 U.S.L.W. 3563 (U.S., Feb. 1, 1983) (No. 82-6080).]

SUMMARY OF ARGUMENT

A review of the standards for issuance of stays that prevail in other Courts of Appeals—as well as the standards which have guided this Court's decisions in analogous contexts—compels the conclusion that the correct stand-

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[3] Petitioner had argued that such a certificate is granted only upon the finding of " 'a substantial showing of the denial of [a] federal right.' " *See Stewart* v. *Beto*, 454 F.2d 268, 270 n.2 (5th Cir. 1971), *cert. denied*, 406 U.S. 925 (1972).

ard to be applied in this case is different from the one apparently adopted by the Fifth Circuit.

The pertinent statutes, 28 U.S.C. §§ 2251 & 2253, do not explicitly endorse the Fifth Circuit's standard. In fact, the text and legislative history of these provisions at least implictly support the position advanced by the ABA —that is, a condemned prisoner ought to receive a stay of execution and a full review of his claims pending the disposition of his initial habeas corpus appeal once a certificate of probable cause has been issued, unless the prisoner's claims are frivolous, such as where they are legally and squarely controlled by recent decisions of this Court, where it can quickly and incontrovertibly be determined on the face of the record that the legal questions raised have no basis in fact, or where they are obviously and totally without merit even if supported by the record.

Turning from considerations of precedent to those of policy, we submit that the standard adopted by the Fifth Circuit would appear to guarantee that serious, disruptive burdens will routinely be placed on those Justices, judges, clerks and others involved in the administration of justice in the Courts of Appeals and in this Court. Frantic telephone calls and hurried judicial conferences will constitute an unnecessary, indeed an unseemly, atmosphere in which to resolve difficult constitutional questions that might better be addressed in the orderly fashion which characterizes other appellate litigation in the federal system.

In addition to the burdens placed on the federal courts, a failure to adopt the standard we propose will, we believe, make incalculably more difficult the often thankless task faced by volunteer attorneys who have agreed to represent penniless, death-sentenced inmates in federal habeas proceedings. Summary procedures that deprive counsel—even those armed with a certificate of probable cause to appeal—of a minimally adequate period in which

to brief and argue a client's case are likely to impair the effectiveness of all but the rarest or most well-financed of attorneys.

Finally, it is critically important to underline that these summary procedures will govern *capital* appeals, where life or death is quite literally at stake. This Court has long held, of course, that capital cases must be viewed under the Eighth Amendment as qualitatively different from cases involving any lesser punishments, and the Court has expressly conditioned its approval of capital punishment upon the assurance of standards for a constitutional death penalty that will serve the goals of measured, consistent application and fairness to the accused. The Court's wise requirement of the utmost procedural care in capital cases would be seriously compromised by tolerance of a system under which the rushed or truncated adjudication of death-sentenced inmates' initial federal appeals becomes the norm.

There are no contrary interests of the States which weigh heavily in the balance. Executions quite obviously are destined in this country to resume in some numbers in the near future. The provision of stays and the granting of normal appellate review to capital inmates will not thwart this development. At most, capital inmates will live a few additional months while their federal constitutional claims receive careful review from the federal appellate courts. Given the absence of any evidence that the federal courts have been plagued with frivolous appeals—by our count, 22 of the 37 capital cases which have been reviewed by Courts of Appeals since 1976 have contained constitutional errors serious enough to require reversal—the Fifth Circuit's standard governing stays seems unsupportable.

We would urge the Court to hold that on any *initial* application by a death-sentenced inmate for a stay of execution pending appeal, once a certificate of probable

cause has been issued, a stay should be granted unless it can be determined on the face of the available documents that the inmate's claims are frivolous, as we have defined that term. Any other standard will necessarily require courts of appeals, and this Court, to consume too much valuable time and energy in making fine distinctions about probable merit under emergency conditions, with inadequate records and little opportunity for reflection.

ARGUMENT

I. THE STANDARD APPARENTLY ADOPTED BY THE COURT OF APPEALS DEPARTS UNNECESSARILY FROM RELEVANT STATUTORY PROVISIONS, FROM THE STANDARDS EMPLOYED IN OTHER CIRCUITS, AND FROM PRIOR DECISIONS OF THIS COURT

A. The Fifth Circuit's Standard

The Fifth Circuit Court of Appeals appears to be uncertain as to the appropriate standard for staying a prisoner's execution in cases like this one. Beginning with *O'Bryan* v. *Estelle*, 691 F.2d 706, 708 (1982), the Fifth Circuit has employed the general standard for issuance of appellate stays in civil cases where there is no particular statute otherwise governing, such as 28 U.S.C. § 2251. This standard was derived from a suit challenging prison conditions. *See Ruiz* v. *Estelle*, 666 F.2d 854 (5th Cir. 1982). Although O'Bryan himself received a stay under this standard, two condemned inmates in subsequent cases were denied a stay in decisions applying the *O'Bryan* standard: *Brooks* v. *Estelle*, No. 82-1613 (5th Cir. Dec. 6, 1982), *stay and cert. denied*, 51 U.S.L.W. 3469 (U.S. Dec. 6, 1982), and this case. In none of these cases did the Court of Appeals refer to 28 U.S.C. § 2251, the statute authorizing Courts of Appeals to stay execution pending disposition of an appeal. Prior to *O'Bryan*, however, the Fifth Circuit had routinely granted stays under Section 2251 to condemned prisoners who had been

granted a certificate of probable cause to prosecute their initial habeas appeal.[4]

In light of this uncertainty, this Court should establish a clear rule to guide the decisions of the Fifth Circuit, and other Courts of Appeals, in cases like this one. And for the answer to this question, this Court should examine the text, legislative history, and underlying policies of the pertinent statutes. *See Rose* v. *Lundy*, 455 U.S. 509, 515 (1982). To those factors, we now turn.

B. The Standard Under the Habeas Statutes

The inquiry into when a stay of execution pending disposition of a condemned prisoner's appeal must issue begins with the language of the pertinent statutes. *See, e.g., Sumner* v. *Mata*, 449 U.S. 539, 544-545 (1981). Two statutes are pertinent here.

Section 2251 of Title 28 authorizes "[a] justice or judge of the United States before whom a habeas corpus proceeding is pending * * *" to "stay any proceeding

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[4] *See Bass* v. *Estelle* (5th Cir. Aug. 17, 1982), *motion to vacate stay denied sub nom. Estelle* v. *Bass*, 103 S.Ct. 36 (1982), *habeas relief denied*, 696 F.2d 1154 (1983); *Baldwin* v. *Maggio* (5th Cir. May 24, 1982); *Beavans* v. *Maggio* (5th Cir. Nov. 2, 1981); *Clark* v. *Maggio* (5th Cir. Nov. 2, 1981); *Baldwin* v. *Blackburn* (5th Cir. May 1981), *habeas relief denied*, 653 F.2d 942, *cert. denied*, 102 S. Ct. 2918 (1982); *Williams* v. *Blackburn* (5th Cir. Mar. 28, 1981), *habeas relief denied*, 649 F.2d 1019 (1981), *affirmed en banc sub nom. Williams* v. *Maggio*, 679 F.2d 381 (1982); *Gray* v. *Lucas* (5th Cir. Jan. 16, 1981), *habeas relief denied*, 677 F.2d 1086 (1982), *supplemented*, 685 F.2d 139 (1982); *Burns* v. *Estelle* (5th Cir. Sept. 27, 1978), *habeas relief granted*, 592 F.2d 1297 (1979), *aff'd en banc*, 623 F.2d 929 (1980), *cert. denied*, 450 U.S. 1001, 1014 (1981); *Jurek* v. *Estelle* (5th Cir. Feb. 28, 1978), *habeas relief granted*, 593 F.2d 672 (1979), *aff'd en banc*, 623 F.2d 929 (1980), *cert. denied*, 450 U.S. 1001, 1014 (1981); *Spinkellink* v. *Wainwright* (5th Cir. Sept. 6, 1977), *habeas relief denied*, 578 F.2d 582 (1978), *cert. denied*, 441 U.S. 976 (1979); *Brent* v. *White*, 398 F.2d 503, 507 (5th Cir. 1968), *cert. denied*, 393 U.S. 1123 (1969); *Clarke* v. *Grimes*, 374 F.2d 550, 553 (5th Cir. 1967); *Whitney* v. *Wainwright*, 339 F.2d 275 (5th Cir. 1964).

against the person detained * * * by or under the authority of any State for any matter involved in the habeas corpus proceeding." This statute clearly authorizes the federal courts to stay a condemned prisoner's execution. Section 2253 of Title 28 provides that "the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had," but that "[a]n appeal may not be taken * * * unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause." [5] By its terms, Section 2253 is applicable to *any* prisoner, whether under a capital sentence or some lesser punishment, and imposes no precondition to appeal once a prisoner has obtained a certificate of probable cause. The plain meaning of this statute is that a prisoner, under any sentence, is entitled to appeal the denial of a petition for a writ of habeas corpus once he has obtained a certificate of probable cause to appeal. Because carrying out a capital sentence prior to the disposition of a condemned inmate's appeal will render his appeal legally (and literally) moot (*see Weinstein* v. *Bradford*, 423 U.S. 147 (1975) (per curiam)), the plain language of Section 2253 presupposes that a stay of execution will issue under Section 2251 of right whenever a condemned inmate obtains a certificate of probable cause to appeal.

The historical background to and legislative history of Sections 2251 and 2253 confirms the plain meaning of its text. Section 2251 traces its lineage to the Habeas Corpus Act of 1867, the first act empowering federal courts to issue a writ of habeas corpus for persons in state custody. Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385. Section 1 of the Act authorized federal courts to issue a writ of

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[5] A panel of the Court of Appeals may also issue a certificate of probable cause. *In re Burwell*, 350 U.S. 521, 522 (1956) (per curiam) (answering certified questions); *Rogers* v. *Teets*, 350 U.S. 809 (1955) (per curiam); *Burwell* v. *Teets*, 350 U.S. 808 (1955) (per curiam).

habeas corpus for persons in state custody detained in violation of federal law, and also provided that any state court proceedings would be automatically stayed pending disposition of a party's habeas corpus petition. The last clause of Section 1 provided:

> [P]ending such proceedings or appeal, and until final judgment be rendered therein, and after final judgment of discharge in the same, any proceeding against such person so alleged to be restrained of his or her liberty in any State court, or by or under the authority of any State, for any matter or thing so heard and determined, or in process of being heard and determined, under and by virtue of such writ of habeas corpus, shall be deemed null and void. [14 Stat. 386 (codified at Revised Stat. § 766 (2d ed. 1878).]

This provision imposed an automatic, mandatory stay of execution pending full disposition of a condemned prisoner's petition for a writ of habeas corpus, as this Court recognized on numerous occasions. *See, e.g., Rogers* v. *Peck*, 199 U.S. 425, 436 (1905); *Lambert* v. *Barrett*, 159 U.S. 660, 662 (1895); *In re Shibuya Jugiro*, 140 U.S. 291, 295 (1891).[6]

In 1908, concerned with the rising tide of frivolous habeas corpus petitions challenging capital sentences which forestalled execution pending completion of the ap-

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[6] As the Court wrote in *Rogers* v. *Peck*:

> The object of this statute is apparent. It requires the state courts and authorities to make no order and entertain no proceeding which shall interfere with the full examination and final judgment in a *habeas corpus* proceeding in the Federal courts, *In re Shibuya Jugiro*, 140 U.S. 291, and in no wise to interfere with the judgment if it shall result in a restoration of the petitioner's freedom when wrongfully imprisoned or restrained. The proceedings annulled are "against the person so imprisoned," etc. The statute aims to entirely prevent action which shall interfere with the perfect freedom of the Federal courts to inquire into the case and make such orders and render such judgment as they shall see fit. [199 U.S. at 436.]

pellate process, Congress amended Revised Statute § 766. Act of Mar. 10, 1908, ch. 76, 35 Stat. 40. This statute eliminated the automatic right to appeal the denial of a habeas corpus petition to this Court and inserted the requirement, now found at 28 U.S.C. § 2253, that a condemned inmate first obtain a certificate of probable cause to appeal before being able to do so. *See* H.R. Rep. No. 23, 60th Cong., 1st Sess. 1-2 (1908); 42 Cong. Rec. 608-609 (1908). Under this provision, this Court had no jurisdiction to hear an appeal in the absence of a certificate of probable cause. *House* v. *Mayo*, 324 U.S. 42, 44 (1945); *Ex parte Patrick*, 212 U.S. 555 (1908) (per curiam); *Bilik* v. *Strassheim*, 212 U.S. 551 (1908) (per curiam). *See Davis* v. *Jacobs*, 454 U.S. 911, 916-917 (1981) (Rehnquist, J., joined by Burger, C.J., & Powell, J., dissenting from denial of cert. on jurisdictional grounds); *Jeffries* v. *Barksdale*, 453 U.S. 914, 915 (1981) (Rehnquist, J., joined by Burger, C.J., & Powell, J., dissenting from denial of cert. on jurisdictional grounds). In 1925, Congress extended the probable cause requirement "to appellate proceedings under this section as [it] heretofore ha[s] applied to direct appeals to the Supreme Court" (*see Jeffries* v. *Barksdale*, 453 U.S. at 915), as part of an overall modification of federal appellate jurisdiction. Act of Feb. 13, 1925, ch. 229, § 6(d), 43 Stat. 940.[7] Congress did not, however, modify the requirement that a stay of execution issue during the disposition of an appeal that was supported by a certificate of probable cause. To the contrary, Section 6(d) also provided that "[t]he provisions of section[] * * * 766 of the Revised Statutes * * *" shall also apply to the Courts of Appeals. 43 Stat. 940.

Congress modified Revised Stat. § 766 in 1934 to eliminate its mandate that a stay of state court *trial* proceed-

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[7] Congress had also modified the Habeas Corpus Act in 1893 to impose a 6 month time period for taking an appeal. Act of Mar. 3, 1893, ch. 226, 27 Stat. 751.

ings issue automatically whenever a state defendant files a petition for habeas corpus before or during his *trial*. Act of June 19, 1934, ch. 673, 48 Stat. 1177. The legislative history of this amendment makes plain that it was designed solely to ensure that state criminal defendants could not disrupt state trial proceedings simply by filing a petition for habeas corpus. Nothing in the legislative history suggests that the 1934 Act was designed to permit a federal court to deny a condemned inmate a stay of execution pending disposition of his appeal where the inmate had obtained a certificate of probable cause. S. Rep. No. 1426, 73d Cong., 2d Sess. 1-3 (1934); H.R. Rep. No. 1726, 73d Cong., 2d Sess. 1-2 (1934); 78 Cong. Rec. 12,366 (1934). In 1948, Congress revised Title 28 in its entirety, but did not make any substantive amendment to the provisions of Revised Stat. § 766.[8] The provisions regarding a stay of execution were codified at 28 U.S.C. § 2251, and the probable cause requirements were codified at 28 U.S.C. § 2253. *See* H.R. Rep. No. 308, 80th Cong., 1st Sess. A179, A180 (1947); Historical and Revision Notes following 28 U.S.C. §§ 2251 & 2253.

The legislative history therefore demonstrates that Congress intended a condemned prisoner to obtain a stay of execution, of right, pending the resolution of his appeal, once he had obtained a certificate of probable cause to appeal. Prior to 1908, a condemned prisoner obtained a stay of execution simply by filing a petition for a writ of habeas corpus. As this Court noted in *Lambert* v. *Barrett*, *supra*, "no order staying proceedings under state authority is made a condition to such stay[;] the bare pendency of an appeal has that effect * * *." 159 U.S. at 662. To prevent frivolous appeals from delaying the States' ability to impose capital sentences, Congress established the re-

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[8] Congress had amended the probable cause requirement in 1938 to add the second paragraph (pertaining to appeals from removals from state to federal court). Act of June 29, 1938, ch. 806, 52 Stat. 1232. That provision is not pertinent to this discussion.

quirement that a prisoner obtain a certificate of probable cause to appeal, first, to this Court and, later, to the federal Courts of Appeals. Congress did not, however, modify the provisions mandating a stay once a condemned inmate *had* obtained such a certificate, and later modified this provision only to ensure that a District Court had the discretion to deny a stay of a pending state *trial*, not execution. In other words, Congress in 1908 specifically considered the problem at issue in this case, and resolved that problem by imposing the probable cause requirement now found at 28 U.S.C. § 2253. Congress concluded that the decision as to whether a stay of execution pending disposition of a condemned prisoner's appeal should issue would be made when the District Court, circuit judge, or Court of Appeals makes the decision as to whether to issue a certificate of probable cause.

Where a certificate does issue, an appeal will follow and a stay must issue; where a certificate does not issue, there will be no appeal. Accordingly, a federal Court of Appeals should issue a stay of execution pending disposition of an appeal whenever a condemned prisoner obtains a certificate of probable cause. Because "the wisdom of such a modification in the law is for *Congress* to consider * * *" (*Brown* v. *Allen*, 344 U.S. 443, 500 (1953) (opinion of Frankfurter, J.) (emphasis supplied)), and it is the obligation of "*this Court* to give fair effect to the habeas corpus jurisdiction as enacted by Congress * * * (*id.* (emphasis supplied)), the court below erred by failing to grant Barefoot a stay of execution pending the complete resolution of his appeal.

This Court implied as much in *Nowakowski* v. *Maroney*, *supra*, when it summarily reversed the Third Circuit's dismissal of a habeas appeal following the grant of a certificate of probable cause:

> [W]hen a district judge grants such a certificate, the court of appeals *must grant an appeal in forma pauperis * * * and proceed* to a disposition of the

> appeal *in accord with its ordinary procedure.* [386 U.S. at 543; emphasis added.]

This could not be done in capital cases unless execution is stayed.

The Ninth Circuit long ago interpreted the relevant statutes in this fashion, addressing the precise question now before the Court. In *Fouquette* v. *Bernard*, 198 F.2d 96, 97 (1952), the "district court [had] denied Fouquette's motion for a stay of his execution [while granting a] * * * certificate of probable cause for the appeal." After reciting these facts, Chief Judge Denman granted Fouquette's application for a stay, holding that "[o]bviously, if there is probable cause for the appeal it would be a mockery of federal justice to execute Fouquette pending its consideration." *See also* Blackmun, *Allowance of In Forma Pauperis Appeals in § 2255 And Habeas Corpus Cases*, 43 F.R.D. 343 (1967).

The Court of Appeals below rejected the logic of *Fouquette*, relying almost wholly upon this Court's order in *Brooks* v. *Estelle*, *supra*. Three members of this Court who dissented from the denial of a stay in *Brooks* argued there that a stay should be granted since the District Court had granted a certificate of probable cause. The court below in the instant case reasoned that since "six members of the Court denied [Brook's] petition for stay, this argument must have been rejected." The majority of this Court, however, simply did not address the dissent's argument in *Brooks*; the petitioner's application there appears to have been denied on other grounds.

Finally, there are two additional points that must be noted. The standard we propose here fully permits the Courts of Appeals to deny a prisoner a stay if his claims are *frivolous*. As this Court noted in *Lambert* v. *Barrett*, "[i]t is natural that counsel for the condemned in a capital case should lay hold of every ground which, in their judgment, might tend to the advantage of their client, but the administration of justice ought not to be

interfered with on mere pretexts." 159 U.S. at 662. While the federal Courts of Appeals should give careful and calm consideration to a condemned prisoner's claims, the federal courts are under no constitutional obligation inexorably to expand substantive and procedural restraints upon the States' authority to carry out lawful sentences. Whether the issue is viewed in terms of issuance of a stay or a certificate of probable cause, federal appellate courts will, under the standard we propose, be able to deny a condemned prisoner a stay if his claims are frivolous. In addition, the standard we propose here, like the situation envisioned by Congress when it legislated Sections 2251 and 2253, deals only with a prisoner's *initial* application. Repetitive petitions, or other actions designed to disrupt the judicial process, are the worst type of "mere pretext[]" that this Court has already denounced. Both of these conclusions are consistent with the standard we support, and with "the policies underlying the statutory provisions[s]" (*Rose* v. *Lundy*, 455 U.S. at 517) relevant to this case.

C. The Standard in Other Circuits

To our knowledge, no other circuit court has adopted a standard for administering stays of execution similar to that currently applied by the Fifth Circuit. For example, in *Shaw* v. *Martin*, 613 F.2d 487 (1980), Judge Phillips of the Fourth Circuit, in granting a stay of execution to a capital inmate, described "appeal[s] in the United States Court of Appeals from the denial by the district court of a first petition for habeas corpus" as lying "within avenues of review so long and so well established that they must be counted among the basic 'protections' with which our system has 'surrounded' all persons convicted of crime." *Id.* at 491.[9] The Eighth Cir-

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[9] *See also Briley* v. *Hutto*, No. 81-6261 (4th Cir. Apr. 23, 1981) (continuing stay to capital inmate); *In re Shaw*, No. 81-1396 (4th

cuit has also either stayed or honored stays of executions of capital inmates pending initial habeas appeals,[10] as has the Ninth Circuit.[11]

The Eleventh Circuit has firmly adopted the position (i) that "[u]pon the issuance of the certificate [of probable cause], the petitioner ha[s] an absolute right to appeal the final order of the district court" (*Dobbert* v. *Strickland*, 670 F.2d 938, 939 (1982)), (ii) that such an appeal requires "[a] review on the merits" (*id.*, *citing Nowakowski* v. *Maroney*, *supra*), and (iii) that "[w]here the merits cannot be satisfactorily considered prior to execution of a scheduled death sentence * * * a stay should be granted." *Id.* at 940. In *Goode* v. *Wainwright*, 670 F.2d 941 (11th Cir. 1982), Chief Judge Godbold made it plain that, in the Eleventh Circuit's view, when an appeal

> is properly presented to us—as it is in this case, by assertion of non-frivolous issues that are not foreclosed by the state court processes—the law requires us to [grant a stay and] examine to see whether his trial and appeal did measure up to constitutional standards. [*Id.* at 942.] [12]

Cir. May 15, 1981) (granting stay to capital inmate); *Barfield* v. *Harris*, No. 82-6424 (4th Cir.) (staying initial habeas appeal).

[10] *See Holtan* v. *Parratt*, No. 81-2153 (8th Cir.) *remanded*, 683 F.2d 1163 (8th Cir. 1982); *Collins* v. *Lockhart*, No. 82-1769 (8th Cir. argued Dec. 17, 1982); *Pickens* v. *Lockhart*, No. 82-1836-EA (8th Cir. argued Feb. 2, 1982).

[11] *See Harris* v. *Pulley*, No. 82-5247 (9th Cir.), *remanded*, 692 F.2d 1189 (1982), *pet. for cert. filed*, 51 U.S.L.W. 3512 (U.S. Dec. 29, 1982) (No. 82-1095).

[12] Consistent with this standard, the Eleventh Circuit has routinely granted stays of execution to consider initial habeas appeals in capital cases. *See, e.g.*, *Shriner* v. *Wainwright*, No. 82-5469 (11th Cir. Apr. 20, 1982); *Booker* v. *Wainwright*, No. 82-5468 (11th Cir. Apr. 20, 1982); *Mulligan* v. *Zant*, No. 8027 (11th Cir. Jan. 20, 1982).

This virtually uniform approach in Courts of Appeals outside the Fifth Circuit is consonant with the great attention to procedural fairness that has long marked this Court's own approach to the issuance of stays in capital cases.[13]

In sum, the standard we support is more clearly in line with the statutes and the precedents which have heretofore governed issuance of stays in capital cases than the one apparently adopted by the Fifth Circuit. We will next consider the applicable policy considerations.

II. ANY STANDARD OTHER THAN THE ONE PROPOSED HERE WILL (i) NEEDLESSLY COMPLICATE THE ORDERLY ADMINISTRATION OF JUSTICE, (ii) SERIOUSLY COMPROMISE THE QUALITY OF DEFENSE REPRESENTATION, AND (iii) RISK UNFAIRNESS TO CAPITAL INMATES, WITHOUT SERVING ANY STRONG COUNTERVAILING STATE INTERESTS

Any standard other than the one we propose will, we believe, affect adversely the entire process of federal review of capital cases. Dozens of habeas corpus appeals in the Fifth Circuit will hereafter be reviewed initially

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[13] *See, e.g., Lenhard* v. *Wolff*, 443 U.S. 1306 (1979) (Rehnquist, J., granting stay pending further proceedings); *Evans* v. *Bennett*, 440 U.S. 1301 (1979) (Rehnquist, J., granting stay pending further proceedings); *Ex parte Stickney*, 82 S. Ct. 465 (1965) (Douglas, J., granting stay of Texas inmate after habeas appeal pending review of petition for certiorari); *La Marca* v. *New York*, 78 S. Ct. 106 (1957) (Harlan, J., "[a]s I cannot deem it unreasonable to think that a federal question meriting consideration may be found, * * * I consider it my duty to afford petitioner an opportunity to present his petition * * *"); *Edwards* v. *New York*, 76 S. Ct. 538 (1956) (Harlan, J., although "[t]he petitioner's papers, and the record * * * leave me in grave doubt, to say the least, as to whether petitioner's conviction presents any substantial federal question, * * * [n]evertheless, this being a capital case, I am constrained to give petitioner a reasonable opportunity to petition for a writ of certiorari * * *.").

under emergency timetables imposed by approaching state execution dates. Under such schedules, all participants in the review process—judges, clerks, litigants and attorneys—will be required to set aside other responsibilities in order to participate in life-or-death decisions on whether to afford capital inmates full appellate review, or no review at all. Federal judges must assess the "likelihood of success" of difficult, often novel, constitutional questions, without sufficient time for careful reflection, perhaps without even the opportunity to review lower court records.

Petitioner's own case is illustrative. His three-judge appellate panel, hastily assembled, was presented with a motion for a stay on Friday, January 14th, received petitioner's 1400-page trial transcript and his 260-page federal evidentiary transcript only the following Wednesday, heard oral arguments from counsel the same day, and rendered a sixteen-page opinion twenty-six hours later. The utmost good faith and diligence on the part of the participating judges does not eliminate the risk of oversight or misunderstanding. The Court must ask itself whether such breathtaking expedition in such an important matter can adequately assure both the substance and the appearance of justice in capital cases.

In considering this question, the Court needs be mindful that the disruption of the appellate system occasioned by such expedited review will become increasingly more frequent in years to come. Over 225 capital inmates now crowd Death Rows within the Fifth Circuit, and many of their cases could well follow a similar scenario. While such emergencies will thus become increasingly frequent, we anticipate that they will never become very predictable. Some inmates will obtain stays from District Courts. In other cases, even without formal stays of execution, state courts or executives will simply not set

execution dates. In anticipation of the unforeseeable number of inmates who will face unstayed dates, however, the Court of Appeals will be required to stand ever ready to set aside normal business and invoke emergency procedures.

As this Court undoubtedly recognizes, the burdens of this change in stay standards will be certain to fall, not merely on the Court of Appeals, but on this Court as well. Denial of a stay by the Court of Appeals necessarily will propel each capital inmate—on a foreshortened schedule, with execution imminent—directly to this Court for a final plea for a hearing on the merits of his constitutional claims. This Court will likely be afforded, not the comparative luxury of months or weeks, but merely a few hours or days at most, in which to examine the parties' applications, review the trial and appellate records, evaluate the lower courts opinions, and reach a decision.

In recent years, members of this Court have justifiably directed the attention of the bar and the general public to the increased strains imposed upon the Court by its growing caseload.[14] Faced with other pressing demands on its energy and attention, the Court can ill afford as a matter of judicial administration to take upon itself in coming years the additional responsibility to conduct overnight review of Courts of Appeals' decisions in scores of cases, with life or death hanging in the balance. As an alternative, the certiorari process, after normal

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[14] *See, e.g.*, Washington Post, Feb. 7, 1983, § 1, at A1 (Chief Justice Burger and Justice O'Connor); *id.*, Sept. 24, 1982, § 1, at A3 (Justice Rehnquist); *id.*, Sept. 11, 1982, § 1 at A3 (Justice Marshall); *id.*, Sept. 10, 1982, § 1, at A2 (Justice Brennan); *id.*, Aug. 10, 1982, § 1, at A11 (Justice Powell); *id.*, Aug. 10, 1982, § 1, at A6 (Justice White); *id.*, Aug. 7, 1982, § 1, at A3 (Justice Stevens).

federal appellate review, provides this Court with a far more reasonable and manageable means to evaluate a capital inmate's final appeal than any hurried, pressured review under the threat of imminent execution.

A more careful and orderly approach to the issuance of stays of execution serves the needs of others beside the courts and administrative personnel. One of the major empirical assumptions of the Fifth Circuit's system of expedited judicial review appears to be that capital offense attorneys can somehow render adequate assistance to their clients under these emergency review conditions. We would certainly not impute to the Court of Appeals an indifference to the question of attorney assistance on appeal. Yet we believe that, in fact, capital inmates and their attorneys will suffer seriously from the Court of Appeals' new system. Most capital proceedings in District Courts within the Fifth Circuit are currently being handled by unpaid, volunteer attorneys, many of them solo practitioners without extensive support services and research facilities.[15] Adoption of summary stay procedures will place an enormous financial burden on these attorneys—for the rapid reproduction of documents, for overnight delivery services, for trips to hastily convened oral arguments—and may disrupt for weeks at a time the attorneys' other practice.

Apart from financial and personal burdens to be placed on counsel, summary procedures will inevitably seriously constrict the time available for research and writing on the constitutional claims at issue. Since a District Court's opinion often sets the agenda for appellate review, only

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[15] As the Court knows, several larger organizations opposed to capital punishment have been involved in many of the early cases which have reached the circuit courts on federal habeas review. The burgeoning number of capital cases and the limited resources of these organizations makes it unlikely that, in the future, most capital litigants and their attorneys can draw upon these organizations for financial support or expert legal assistance.

a limited amount of work can be done by counsel before an opinion is rendered. In addition, many attorneys in capital cases are not fully familiar with the intricacies of federal appellate procedures or the nuances of complex constitutional issues. Clients may well risk losing their cases, and their lives, simply because their attorneys will not, under expedited procedures, have sufficient time to pursue their cases in conformance with appellate rules or relevant constitutional decisions. In short, truncated appellate procedures will, we believe, materially and adversely influence the quality and scope of defense assistance rendered to capital inmates.

This impairment of defense counsel's ability to assist their capital clients also impinges upon the considerations of fairness this Court has articulated in capital cases. The Court has long and properly insisted that capital cases be surrounded by the strictest standards to ensure procedural fairness. *See, e.g., Woodson* v. *North Carolina*, 428 U.S. 280, 305 (1976) ("there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment"); *Gardner* v. *Florida*, 430 U.S. 349, 357-358 (1977); *Lockett* v. *Ohio*, 438 U.S. 586, 603-604 (1978); *Beck* v. *Alabama*, 447 U.S. 625, 637-638 (1980); *Eddings* v. *Oklahoma*, 455 U.S. 104, 117-118 (1982) (O'Connor, J., concurring). In light of this wise and consistent precedent, it is difficult to justify appellate procedures affording greater protection on habeas appeal for minor felons than for those convicted of first degree offenses and sentenced to death. Yet that is precisely the impact of the Court of Appeals' stay procedures, which would permit a petty thief, challenging his conviction in the Court of Appeals, a far greater procedural opportunity to secure reversal—including a full opening brief, a reply brief, and an oral argument if deemed necessary—than a capital defendant possessing a certificate of probable cause to ap-

peal. If rules which provide for full briefing and argument are deemed generally useful or significant in obtaining fair and careful review of lesser criminal appeals, we can think of no valid constitutional considerations which would require *fewer* procedural protections to be afforded capital defendants, at least on their initial federal habeas appeals.[16]

We can identify no adequate countervailing interests supporting the Fifth Circuit's standard. Attorneys General of several states have naturally indicated their desire, on behalf of citizens in their respective states, to carry out executions that have been ordered by their state courts. Yet it seems obvious that executions are soon to resume in earnest in this country, whether or not full federal appellate review is required. Granting stays to capital inmates on appeal will do little to retard this development. Although individual inmates will have their respective executions postponed for the minimum time needed to obtain appellate review, once a sufficient number of cases within the Fifth Circuit has completed this review process, the total number and frequency of executions will be affected by the allowance of a full review process only if, and insofar as, the Courts of Appeals discover fundamental constitutional errors, after full briefings and argument, that might have been overlooked had review been limited to summary stay procedures. The States surely can have no legitimate interest in expeditious procedures *solely because* their expedition might make identification and redress of constitutional violations more difficult. No one, in short, can validly

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[16] We repeat that nothing in our submission to this Court is meant to suggest that the federal courts should be denied the procedural means to dispose summarily of frivolous or repetitive petitions submitted by condemned prisoners merely to delay their executions.

oppose normal review procedures because of the prospect that they will uncover too many constitutional errors.

Moreover, we would hope that this Court would specifically condemn expedited treatment in cases such as this one. The reason is threefold. First, this would be the petitioner's initial federal appeal. Secondly, the District Court would have already determined that there was sufficient merit in his claims to warrant the issuance of a certificate of probable cause. Finally, the Court of Appeals would have made a preliminary determination that the claims were nonfrivolous on their face. Given these facts, and the further crucial consideration that these are death cases, we submit that only a full, normal, untruncated appellate review would be justified.

But if this Court concludes that the Courts of Appeals should be permitted to dispose of these appeals on an expedited basis, we submit that the Courts of Appeals should first adopt such procedures as part of their local rules, rather than follow such a route on an ad hoc basis. *See In re Burwell*, 350 U.S. at 522. By so doing, everyone concerned will have notice of the manner by which appeals will be resolved, and will be able best to prepare for an appeal once a District Court has denied a petition and the notice of appeal has been lodged in the District Court. Otherwise, counsel will not be able to gauge how to prepare a client's appeal, and the Courts of Appeals will not be able to gather the records and other materials necessary for a full appraisal of a prisoner's claims.

In sum, any stay procedures other than the one we suggest will inevitably cast serious and unjustifiable new burdens on the Court of Appeals itself, on this Court, and on capital defendants within the Fifth Circuit. Those burdens are not warranted by considerations of judicial administration and policy, and no legitimate considerations argue in favor of any other standard.

III. THE COURT SHOULD ADOPT A STANDARD UNDER WHICH THE STAYS OF EXECUTION WILL BE GRANTED TO CAPITAL INMATES UPON THEIR *INITIAL* FEDERAL APPEAL UNLESS THE CONSTITUTIONAL CLAIMS THEY PRESENT ARE LEGALLY FRIVOLOUS

As an appropriate alternative to the Fifth Circuit's stay standard, we recommend to this Court the standard adopted by the Eleventh Circuit in *Goode* v. *Wainwright*, *supra*, under which a circuit court must grant stays of a capital inmate's initial habeas appeal if the petitioner has asserted "nonfrivolous issues" (670 F.2d at 943), which have not indisputably been waived by petitioner's failure to comply with state court procedures. *See Dobbert* v. *Strickland*, *supra*, 670 F.2d at 940.

"Nonfrivolous issues," we believe, should be defined to encompass any federal constitutional claims that are not squarely contrary to recent decisions of this Court,[17] that are not refuted, as a matter of fact, solely from a review of the records, or that are obviously and wholly without merit even if supported by the record. This standard would allow judgments to be made rapidly by the appellate courts, with a minimum of disruption to the ordinary functioning of the judicial process. Any higher standard, however, would necessarily require just the sort of intensive, time-consuming legal evaluation that is a principal administrative flaw with the Fifth Circuit's current procedures.

The issue here must be viewed in tandem with the standard governing issuance of a certificate of probable

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[17] A standard which would exclude apellate reconsideration of claims arguably contrary to *any* prior decisions of this Court would be unwarranted in light of broad changes that have occurred in the criminal law, especially the law governing capital cases, during the past two decades. *See, e.g., Gardner* v. *Florida*, 430 U.S. at 355-58 (distinguishing *Williams* v. *New York*, 337 U.S. 241 (1949); *Bullington* v. *Missouri*, 451 U.S. 430 (1981) (distinguishing *Stroud* v. *United States*, 251 U.S. 15 (1919)).

cause to appeal, under which a petitioner must make a "substantial showing of the denial of [a] federal right." *Stewart* v. *Beto*, 454 F.2d at 270 n.2; *see also Jeffries* v. *Barksdale*, 453 U.S. at 914 (Rehnquist, J., joined by Burger, C.J., and Powell, J., dissenting from denial of certiorari on jurisdictional grounds, and citing *United States ex rel. Tillery* v. *Carel*, 294 F.2d 12, 14-15 (3d Cir. 1961), for the proposition that 28 U.S.C. § 2253 seeks to bar "frivolous" appeals). Under these cases, we fully expect that very few capital inmates who have obtained a certificate will thereafter be denied stays of execution pending an initial habeas appeal. This seems the preferable course under the statutes and precedents which govern habeas corpus appeals and, indeed, under our system of justice generally. All parties can be more confident that capital sentences in this country are being fairly and justly carried out if executions do not take place amid a flurry of last-minute legal proceedings, requiring hasty judgments from federal judges under pressure to render overnight decisions. An orderly appellate review process should serve the vitally important function of assuring "to the defendant and to the community that any decision to impose the death penalty be, and appear to be, based on reason." *Gardner* v. *Florida*, 430 U.S. at 358. As *amicus curiae*, we urge the Court to adopt a standard for the issuance of stays of execution that will once again make this careful and orderly appellate review process possible.

CONCLUSION

The Court should adopt the standard governing stays of execution set forth in this brief.

Dated: March 5, 1983

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

THOMAS A. BAREFOOT,
Petitioner,

v.

W. J. ESTELLE, JR., Director
Texas Department of Corrections,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF AMICUS CURIAE FOR THE AMERICAN PSYCHIATRIC ASSOCIATION

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THOMAS A. BAREFOOT,
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v.

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Texas Department of Corrections,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF AMICUS CURIAE FOR THE AMERICAN PSYCHIATRIC ASSOCIATION

INTEREST OF AMICUS CURIAE

The American Psychiatric Association, founded in 1844, is the nation's largest organization of qualified doctors of medicine specializing in psychiatry. Almost 27,000 of the nation's approximately 34,000 psychiatrists are members. The Association has participated as amicus curiae in numerous cases involving mental health issues, including *Youngberg v. Romeo*, 102 S. Ct. 2452 (1982), *Mills v. Rogers*, 102 S. Ct. 2442 (1982), *Estelle v. Smith*, 101 S.

Ct. 1866 (1981), *Parham v. J.R.*, 442 U.S. 584 (1979), *Addington v. Texas*, 441 U.S. 418 (1979), and *O'Connor v. Donaldson*, 422 U.S. 563 (1975).

The American Psychiatric Association has been actively involved in examining the role of psychiatrists in predicting future violent behavior and the relationship of those predictions to a variety of legal matters including civil commitment and discharge, the release of persons acquitted by reason of insanity, and the administration of capital punishment statutes. On the basis of these studies the Association believes that it can make an important contribution to the Court's consideration of the issues presented in this case. Resolution of those issues, moreover, will have a significant impact on the overall social and legal responsibility assigned to psychiatrists for predicting violent behavior and the methods that psychiatrists use in such endeavors.

The parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk.

STATEMENT

Petitioner Thomas A. Barefoot stands convicted by a Texas state court of the August 7, 1978 murder of a police officer—one of five categories of homicides for which Texas law authorizes the imposition of the death penalty. *See* Tex. Penal Code § 19.03. Under capital sentencing procedures established after this Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972), the "guilt" phase of petitioner's trial was followed by a separate sentencing proceeding in which the jury was directed to answer three statutorily prescribed questions. *See* Tex. Code Crim. Proc. Art. 37.071. One of these questions—and the only question of relevance here—directed the jury to determine:

> whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.

The jury's affirmative response to this question resulted in petitioner being sentenced to death.

The principle evidence presented to the jury on the question of petitioner's "future dangerousness" was the expert testimony of two psychiatrists, Dr. John T. Holbrook and Dr. James Grigson, both of whom testified for the prosecution.[1] Petitioner elected not to testify in his own defense. Nor did he present any evidence or testimony, psychiatric or otherwise, in an attempt to rebut the state's claim that he would commit future criminal acts of violence.

Over defense counsel's objection, the prosecution psychiatrists were permitted to offer clinical opinions regarding petitioner, including their opinions on the ultimate issue of future dangerousness, even though they had not performed a psychiatric examination or evaluation of him. Instead, the critical psychiatric testimony was elicited through an extended hypothetical question propounded by the prosecutor. On the basis of the assumed facts stated in the hypothetical, both Dr. Holbrook and Dr. Grigson gave essentially the same testimony.

First, petitioner was diagnosed as a severe criminal sociopath,[2] a label variously defined as describing persons

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[1] In addition, the prosecution called several character witnesses who testified to petitioner's "bad reputation" in various communities in which he had lived.

[2] Drs. Grigson and Holbrook used the terms "sociopath" and "antisocial personality disorder" interchangeably. Although the terms are not defined in precisely the same manner, the diagnosis of "sociopath" has been replaced in psychiatric nomenclature by "antisocial personality disorder." The diagnostic criteria for antisocial personality disorder are discussed below at pages 22-23. In general, antisocial personality disorder is characterized by "a history of continuous and chronic antisocial behavior in which the rights of others are violated, persistence into adult life of a pattern of antisocial behavior that began before the age of fifteen, and failure to sustain good job performance over a period of several years . . ." Childhood manifestations of antisocial behavior include

who "lack a conscience" (Grigson, Tr. 2128),[3] and who "do things which serve their own purposes without regard for any consequences or outcomes to other people." (Holbrook, Tr. 2098). Second, both psychiatrists testified that petitioner would commit criminal acts of violence in the future. Dr. Holbrook stated that he could predict petitioner's future behavior in this regard "within reasonable psychiatric certainty." (Tr. 2100). Dr. Grigson was more confident, claiming predictive accuracy of "one hundred percent and absolute." (Tr. 2131).

The prosecutor's hypothetical question consisted mainly of a cataloguing of petitioner's past antisocial behavior, including a description of his criminal record. In addition, the hypothetical question contained a highly detailed summary of the prosecution's evidence introduced during the guilt phase of the trial, as well as a brief statement concerning petitioner's behavior and demeanor during the period from his commission of the murder to his later apprehension by police.

In relevant part, the prosecutor's hypothetical asked the psychiatrists to assume as true the following facts:[4] First, that petitioner had been convicted of five criminal

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"lying, stealing, fighting, truancy, and resisting authority." Adolescent characteristics include "unusually early or aggressive sexual behavior, excessive drinking, and use of illicit drugs." In adulthood, this type of behavior typically continues, "with the addition of inability to sustain consistent work performance or to function as a responsible parent and failure to accept social norms with respect to lawful behavior." American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 318 (3d ed. 1980).

[3] All transcript citations are to the original trial court transcript of the sentencing proceeding.

[4] The prosecutor stated the hypothetical question twice in the presence of the jury, once in his direct examination of Dr. Holbrook and again in his direct examination of Dr. Grigson. The two versions of the hypothetical are substantially the same. References in the text are to the version propounded to Dr. Grigson.

offenses—all of them nonviolent, as far as the record reveals[5]—and that he had also been arrested and charged on several counts of sexual offenses involving children. (Tr. 2112-13, 2120-21). Second, that petitioner had led a peripatetic existence and "had a bad reputation for peaceful and law abiding citizenship" in each of eight communities that he had resided in during the previous ten years. (Tr. 2113-14). Third, that in the two-month period preceding the murder, petitioner was unemployed, spending much of his time using drugs, boasting of his plans to commit numerous crimes, and in various ways deceiving certain acquaintances with whom he was living temporarily. (Tr. 2114-17). Fourth, that petitioner had murdered the police officer as charged, and that he had done so with "no provocation whatsoever" by shooting the officer in the head "from a distance of no more than six inches." (Tr. 2119). And fifth, that subsequent to the murder, petitioner was observed by one witness, "a homosexual," who stated that petitioner "was not in any way acting unusual or that anything was bothering him or upsetting him . . ." (Tr. 2124).

Testimony of Dr. Holbrook

Dr. Holbrook was the first to testify on the basis of the hypothetical question. He stated that the person described in the question exhibited "probably six or seven major criterias (*sic*) for the sociopath in the criminal area within reasonable medical certainty." (Tr. 2099). Symptomatic of petitioner's sociopathic personality, according to Dr. Holbrook, was his consistent "antisocial behavior" from "early life into adulthood," his willingness to take any action which "serves [his] own purposes" without any regard for the "consequences . . . to other people," and his demonstrated failure to establish any

[5] The stated offenses were possession of an unregistered firearm, distribution of marijuana, possession of amphetamines, carrying a concealed weapon, and possession of marijuana. Tr. 2111-13.

"loyalties to the normal institutions such as family, friends, politics, law or religion." (Tr. 2098).

Dr. Holbrook explained that his diagnosis of sociopathy was also supported by petitioner's past criminal violence and "serious threats of violence," as well as an apparent history of "escaping or running away from authority" rather than "accepting a confrontation in the legal way in a court of law." (Tr. 2099). And finally, Dr. Holbrook testified that petitioner had shown a propensity to "use other people through lying and manipulation . . ." (Tr. 2098). According to Dr. Holbrook, by use of such manipulation the sociopath succeeds in "enhancing [his] own ego image . . . It makes [him] feel good." *Ibid.*

After stating his diagnosis of sociopathy, Dr. Holbrook was asked whether he had an "opinion within reasonable psychiatric certainty as to whether or not there is a probability that the Thomas A. Barefoot in that hypothetical will commit criminal acts of violence in the future that would constitute a continuing threat to society?" (Tr. 2100). Without attempting to explain the implied clinical link between his diagnosis of petitioner and his prediction of future dangerousness, Dr. Holbrook answered simply: "In my opinion he will." (Tr. 2101).

Testimony of Dr. Grigson

On the basis of the prosecutor's hypothetical question, Dr. Grigson diagnosed petitioner as "a fairly classical, typical, sociopathic personality disorder" of the "most severe category." (Tr. 2128-29). The most "outstanding characteristic" of persons fitting this diagnosis, according to Dr. Grigson, is the complete "lack of a conscience." (Tr. 2128). Dr. Grigson stated that such persons "repeatedly break the rules, they con, manipulate and use people, [and] are only interested in their own self pleasure [and] gratification." *Ibid.*

Although Dr. Grigson testified that some sociopathic individuals do not pose a continuing threat to society, he

characterized petitioner as "your most severe sociopath." (Tr. 2129). Dr. Grigson stated that persons falling into this special category are "the ones that . . . have complete disregard for another human being's life." *Ibid.* Dr. Grigson further testified that "there is not anything in medicine or psychiatry or any other field that will in any way at all modify or change the severe sociopath." *Ibid.*

The prosecutor then asked Dr. Grigson to state his opinion on the ultimate issue—"whether or not there is a probability that the defendant . . . will commit criminal acts of violence that would constitute a continuing threat to society?" (Tr. 2131). Again, without explaining the basis for his prediction or its relationship to the diagnosis of sociopathy, Dr. Grigson testified that he was "one hundred percent" sure that petitioner "most certainly would" commit future criminal acts of violence. *Ibid.* Dr. Grigson also stated that his diagnosis and prediction would be the same whether petitioner "was in the penitentiary or whether he was free." *Ibid.*

INTRODUCTION AND SUMMARY OF ARGUMENT

The questions presented in this case are the logical outgrowth of two prior decisions by this Court. In the first, *Jurek v. Texas*, 428 U.S. 262 (1976), the Court dealt with the same Texas capital sentencing procedure involved here. The Court there rejected a constitutional challenge to the "future dangerousness" question, ruling that the statutory standard was not impermissibly vague. Although recognizing the difficulty inherent in predicting future behavior, 428 U.S. at 274, the Court held that "[t]he task that [the] jury must perform . . . is basically no different from the task performed countless times each day throughout the American system of criminal justice." 428 U.S. at 276. The *Jurek* Court thus upheld the use of the Texas statutory question, but did not consider the types of evidence that could be presented to the jury for purposes of this determination.

Subsequently in *Estelle v. Smith*, 101 S. Ct. 1866 (1981), the Court again dealt with the Texas sentencing scheme—this time in the context of a psychiatric examination to determine the defendant's competency to stand trial. The Court held that the Fifth Amendment's privilege against self-incrimination applied to such psychiatric examinations, at least to the extent that a prosecution psychiatrist later testifies concerning the defendant's future dangerousness. The Court reasoned that although a defendant has no generalized constitutional right to remain silent at a psychiatric examination properly limited to the issues of sanity or competency, full *Miranda* warnings must be given with respect to testimony concerning future dangerousness because of "the gravity of the decision to be made at the penalty phase, . . ." *Id.* at 1873-74. The *Smith* decision thus enables a capital defendant to bar a government psychiatric examination on the issue of future dangerousness.

The instant case raises the two issues left unresolved in *Jurek* and *Smith*. These are, first, whether a psychiatrist, testifying as an expert medical witness, may ever be permitted to render a prediction as to a capital defendant's long-term future dangerousness. The second issue is whether such testimony may be elicited on the basis of hypothetical questions, even if there exists no general prohibition against the use of expert psychiatric testimony on the issue of long-term future dangerousness. Amicus believes that both of these questions should be answered in the negative.

I. Psychiatrists should not be permitted to offer a prediction concerning the long-term future dangerousness of a defendant in a capital case, at least in those circumstances where the psychiatrist purports to be testifying as a medical expert possessing predictive expertise in this area. Although psychiatric assessments may permit short-term predictions of violent or assaultive behavior, medical knowledge has simply not advanced to the point where long-term predictions—the type of testimony at issue in

this case—may be made with even reasonable accuracy. The large body of research in this area indicates that, even under the best of conditions, psychiatric predictions of long-term future dangerousness are wrong in at least two out of every three cases.

The forecast of future violent conduct on the part of a defendant in a capital case is, at bottom, a lay determination, not an expert psychiatric determination. To the extent such predictions have any validity, they can only be made on the basis of essentially actuarial data to which psychiatrists, *qua* psychiatrists, can bring no special interpretative skills. On the other hand, the use of psychiatric testimony on this issue causes serious prejudice to the defendant. By dressing up the actuarial data with an "expert" opinion, the psychiatrist's testimony is likely to receive undue weight. In addition, it permits the jury to avoid the difficult actuarial questions by seeking refuge in a medical diagnosis that provides a false aura of certainty. For these reasons, psychiatric testimony on future dangerousness impermissibly distorts the fact-finding process in capital cases.

II. Even if psychiatrists under some circumstances are allowed to render an expert medical opinion on the question of future dangerousness, amicus submits that they should never be permitted to do so unless they have conducted a psychiatric examination of the defendant. It is evident from the testimony in this case that the key clinical determination relied upon by both psychiatrists was their diagnosis of "sociopathy" or "antisocial personality disorder." However, such a diagnosis simply cannot be made on the basis of a hypothetical question. Absent an in-depth psychiatric examination and evaluation, the psychiatrist cannot exclude alternative diagnoses; nor can he assure that the necessary criteria for making the diagnosis in question are met. As a result, he is unable to render a medical opinion with a reasonable degree of certainty.

These deficiencies strip the psychiatric testimony of all value in the present context. Even assuming that the diagnosis of antisocial personality disorder is probative of future dangerousness—an assumption which we do not accept—it is nonetheless clear that the limited facts given in the hypothetical fail to disprove other illnesses that plainly do not indicate a general propensity to commit criminal acts. Moreover, these other illnesses may be more amenable to treatment—a factor that may further reduce the likelihood of future aggressive behavior by the defendant.

ARGUMENT

Long concerned about potential abuses in capital sentencing, this Court has labored to assure that the death penalty "could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner." *Gregg v. Georgia*, 428 U.S. 153, 192 (1976) (plurality opinion). If that sentencing process is not to be undermined by reliance on groundless assertions of professional expertise, the practices at issue in this case should be struck down. As we will show, the psychiatric testimony that led to petitioner's death sentence was not the product of legitimate professional dispute. It was instead a distortion of expert opinion designed to mask the personal views of two individuals who happen to be psychiatrists.

While it is true that the use of expert testimony in state prosecutions is traditionally a matter of state evidentiary law, *see, e.g.*, J. Wigmore, *Treatise on Anglo-American System of Evidence in Trials at Common Law*, § 6e (3d ed. 1940), it is now recognized that capital punishment cases are constitutionally "different." *Gardiner v. Florida*, 430 U.S. 349, 357 (1977) (plurality opinion). It is of "vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." *Id.* at 358. "[T]he penalty of death is

qualitatively different from a sentence of imprisonment, however long. . . . Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion). In amicus' view, the psychiatric testimony given in this case cannot be squared with these basic constitutional principles.

I. The Use of Psychiatric Testimony in a Capital Case on the Issue of a Defendant's Long-Term Future Dangerousness is Constitutionally Invalid Because it Undermines the Reliability of the Factfinding Process.

Contrary to the claims of the prosecution psychiatrists who testified in this case, psychiatric predictions of long-term future dangerousness—even under the best of conditions and on the basis of complete medical data—are of fundamentally low reliability. Although a likelihood of future violent behavior may be assigned to a given individual solely on the basis of statistical "base rates" and other information of an actuarial nature, psychiatric determinations in this area have little or no independent validity. We believe, therefore, that diagnoses of "sociopathy" or "antisocial personality disorder," and predictions of future behavior characterized as "medical opinions," serve only to distort the factfinding process. Because the prejudicial impact of such assertedly "medical" testimony far outweighs its probative value, it should be barred altogether in capital cases.[6]

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[6] In *Estelle v. Smith*, *supra*, 101 S. Ct. at 1879, the Court stated in passing that "[w]hile in no sense disapproving the use of psychiatric testimony bearing on the issue of future dangerousness, the holding in *Jurek* was guided by recognition that the inquiry mandated by Texas law does not require resort to medical experts." To the extent this *dicta* suggests that psychiatric testimony on long-term dangerousness may be admitted as *expert* testimony, we believe that it should not be followed.

The unreliability of psychiatric predictions of long-term future dangerousness is by now an established fact within the profession.[7] In the early 1970s the American Psychiatric Association appointed a Task Force of distinguished psychiatric experts "to assemble the body of knowledge concerning the individual violent patient and the clinical issues surrounding his case." American Psychiatric Association Task Force on Clinical Aspects of the Violent Individual, *Clinical Aspects of the Violent Individual* at v (1974). The primary finding of this Task Force was that judgments concerning the long-run potential for future violence and the "dangerousness" of a given individual are "fundamentally of very low reliability." *Id.* at 23. The report flatly concluded that "the state of the art regarding predictions of violence is very unsatisfactory. The ability of psychiatrists . . . to reliably predict future violence is unproved." *Id.* at 30.

This conclusion has been confirmed repeatedly by the research in the field, including research designed to establish the validity of psychiatric predictions of violent behavior. A 1975 monograph published by the National Institute of Mental Health, A. Stone, *Mental Health and*

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[7] Predictions of short-term future behavior are to be distinguished from predictions of long-term future dangerousness in this regard. In civil commitment cases, for example, as this Court recognized in *Addington v. Texas*, 441 U.S. 418 (1979), psychiatrists are commonly called on to make predictions about short-term prognoses, and such predictions sometimes include potential violence. The psychiatrist is able to evaluate the patient's current mental condition and to discern its likely effect on behavioral patterns, including potentially violent behavior in the near future. Such situations, however, are clinically different from predictions of long-term dangerousness because they are made in the context of specific and usually acute mental illnesses (for example, severe depression), and they are made with knowledge of the individual's short-run environmental situation, which may have a direct bearing on the likelihood that he will act dangerously. *See* Monahan, *Prediction Research in the Emergency Commitment of Dangerous Mentally Ill Persons: A Reconsideration*, 135 Amer. J. Psychiatry 198 (1978).

Law: A System in Transition 27-36 (1975), determined that the professional literature demonstrated no reliable criteria for psychiatric predictions of long-term future criminal behavior. *Id.* at 29, citing, S. Halleck, *Psychiatry and the Dilemmas of Crime* 348 (1971); Sturup, *"Will This Man Be Dangerous?"* in DeReueck & Porter, *The Mentally Abnormal Offender* 17 (1968); Kozol, *et al.*, *The Diagnosis and Treatment of Dangerousness*, 18 Crime and Delinquency 371, 383 (1972).

A more recent monograph, also published by the National Institute of Mental Health, again found that psychiatrists were more often wrong than right in predicting violent behavior over an extended period of time. J. Monahan, *The Clinical Prediction of Violent Behavior* (1981). After a review of all major research published in the 1970s, the monograph concluded that no psychiatric procedures or techniques had succeeded in reducing the high rate of "false positive" predictions—that is, affirmative predictions of future violent behavior that are subsequently proven erroneous. Professor Monahan observed that, even allowing for possible distortions in certain of the research data, "it would be fair to conclude that the best clinical research currently in existence indicates that psychiatrists and psychologists are accurate in no more than one out of three predictions of violent behavior over a several-year period . . ." *Id.* at 49.[3]

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[3] Accord, Schwitzgebel, *"Prediction of Dangerousness and its Implications for Treatment"* in W. J. Curran, A. L. McGarry, & C. S. Petty, *Modern Legal Medicine, Psychiatry, and Forensic Medicine* 784 (1980) ("the professional literature almost uniformly affirms low predictive accuracy with regard to the dangerousness of mental patients"). *See also* Diamond, *The Psychiatric Prediction of Dangerousness*, 123 U. Pa. L. Rev. 439 (1974); Ennis & Litwack, *Psychiatry and The Presumption of Expertise: Flipping Coins in The Courtroom*, 62 Calif. L. Rev. 693 (1974); Livermore, Malmquist, & Meehl, *On the Justifications for Civil Commitment*, 117 U. Pa. L. Rev. 17 (1968); Steadman & Cocozza, *Psychiatry, Dangerousness,*

The fact that psychiatrists are unable to predict future violent behavior does not mean that such predictions can never be made. Indeed, this Court's decision in *Jurek v. Texas, supra*, rejecting a vagueness challenge to the Texas future dangerousness standard, forecloses that argument. What we do contend, however, is that the long-term prediction of future dangerousness is an essentially lay determination that should be based not on the diagnoses and opinions of medical experts, but on the basis of predictive statistical or actuarial information that is fundamentally non-medical in nature. The psychiatric gloss on such data furnished by expert medical testimony provides little, if any, additional information to the jury.

Recent research indicates that the most reliable—although by no means dispositive—predictors of long-term future violent behavior are factors having nothing to do with psychiatric disorders or illnesses. Thus, for example, an individual's past history of violent criminal behavior correlates positively with future criminal behavior. *See* Shah, *Dangerousness: A Paradigm for Exploring Some Issues in Law and Psychology*, 33 American Psychologist 224-38 (1978); J. Monahan, *The Clinical Prediction of Violent Behavior, supra*, at 71. The more violent crimes a defendant has already committed, the more likely he is to engage in further criminal activity in the future.[9] Other factors that may be predictive of future

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and The Repetitively Violent Offender, 69 J. Crim. Law & Criminology, 226, 229-231 (1978); Wenck, Robinson, & Smith, *Can Violence Be Predicted?* 18 Crime and Delinquency 393 (1972).

[9] One study of approximately 45,000 criminal defendants in the Washington, D.C. metropolitan area found an extremely high probability of rearrest for a person with five or more previous arrests. See Shah, *Dangerousness: A Paradigm for Exploring Some Issues in Law and Psychology, supra.* Another study determined that virtually all the violent crime committed by released mental patients is committed by individuals who had extensive criminal records prior to their hospitalization. Steadman, Cocozza, & Melick, *Explaining the Increased Crime Rate of Mental Patients: The*

violent behavior include age (a disproportionate amount of violent crime is committed by persons between ages fifteen and twenty);[10] sex (nearly 90 percent of all persons arrested for violent crimes are male);[11] and race (blacks account for 46 percent of all arrests for violent crime).[12] Still other factors that are characteristic of criminal recidivists are a history of drug or alcohol addiction[13] and persistent unemployment.[14] Significantly, one factor which demonstrably *fails* to correlate with recurring criminal activity is mental illness. *See* Monahan, *The Clinical Prediction of Violent Behavior*, *supra*, at 78.

Although there will always be difficulties in predicting future dangerousness, *Jurek v. Texas*, *supra*, 428 U.S. at 275-76, it is clear that relevant testimony concerning the above factors may be presented to a jury by persons having no credentials in the area of psychiatry. Information concerning the defendant himself—for instance, past criminal record and employment history—can obviously

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Changing Clientele of State Hospitals, 135 American Journal of Psychiatry 816-20 (1978). In this regard, researchers have found that a history of criminal behavior starting before age fifteen is particularly predictive of future violence.

[10] *See* F. Zimring, *Confronting Youth Crime: Report of the Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders* (1978).

[11] *See* W. Webster, *Crime in the United States—1977* (Federal Bureau of Investigation, 1978).

[12] W. Webster, *Crime in the United States*, *supra*. *See also* C. Silberman, *Criminal Violence, Criminal Justice* 117-18 (1978). In referring to this factor, we do not intend to suggest that its usage would be constitutionally permissible or appropriate in a sentencing hearing.

[13] Pritchard, *Stable Predictors of Recidivism*, 7 Journal Supplement Abstract Service 72 (1977).

[14] Cook, *The Correctional Carrot: Better Jobs for Parolees*, 1 Policy Analysis 11-54 (1975); D. Pritchard, *Stable Predictors of Recidivism*, *supra*.

be presented by lay witnesses. To the extent statistical information is considered relevant and desirable, such evidence may be given by statisticians, actuaries or, perhaps ideally, by corrections officers having experience in statistically-based parole decisions. This testimony could even be given by psychiatrists, but only if it is clear that they are furnishing lay evidence, not medical evidence.

Provided with this non-medical evidence, the jury is capable of deciding whether the objective facts relating to a particular defendant create a sufficient likelihood of future dangerousness to warrant the most severe criminal sanction. "The task that a Texas jury must perform in answering the statutory question in issue is thus basically no different from the task performed countless times each day throughout the American system of criminal justice." *Jurek v. Texas*, *supra*, 428 U.S. at 276. This determination, as the Court has made clear, "does not require a resort to medical experts." *Estelle v. Smith*, *supra*, 428 U.S. at 276.

While adding little, if anything, to the factual evidence concerning the risk of future dangerousness, psychiatric opinions on this subject substantially prejudice the defendant in two ways. First, psychiatric testimony is likely to be given great weight by a jury simply because it is, or purports to be, a statement of professional opinion. A psychiatrist comes into the courtroom wearing a mantle of expertise that inevitably enhances the credibility, and therefore the impact, of the testimony. As stated in a recent federal district court decision involving precisely this issue, when a prediction of future dangerousness "is proffered by a witness bearing the title of 'doctor,' its impact on the jury is much greater than if it were not masquerading as something it is not." *White v. Estelle*, Civil Action No. H-81-1661 (S.D. Tex. Dec. 30, 1982) (Slip op. at 17). Accord, *People v. Murtishaw*, 175 Cal. Rptr. 738, 631 P.2d 446 (Cal. S. Ct. 1981).

Second, and more important, psychiatric predictions of violent conduct unduly facilitate a jury's finding of future dangerousness by providing a clinical explanation for what is, at best, only an assessment of statistical probabilities. A medical diagnosis of antisocial personality disorder is in essence a descriptive label for past aberrant behavior of a particular type. When stated to a jury, however, the term "sociopath" (or "antisocial personality disorder") conveys the erroneous impression of an endogenous disorder which bears a cause-and-effect relationship to similar, future behavior. Medical opinions in this area thus offer the jury a seductively facile—but wholly unfounded—explanation as to why a particular individual having the statistical "symptoms" of a recidivist will in fact be a recidivist. Psychiatrists testifying on the question of future dangerousness, in other words, tend to particularize actuarial data in a manner not permitted by the data themselves. The jury is told, in effect, that the defendant not only has the statistically relevant characteristics of persons who commit multiple criminal acts, but that he *is* such a person.

The prejudice resulting from this distortion is significant. "Since the members of the jury will have had little, if any, previous experience in sentencing, they are unlikely to be skilled in dealing with the information they are given." *Gregg v. Georgia, supra*, 428 U.S. at 192. Nor can cross-examination or rebuttal experts limit or remove this prejudice. Because most psychiatrists do not believe that they possess the expertise to make long-term predictions of dangerousness, they cannot dispute the conclusions of the few who do. Instead of offering a countervailing prediction of nondangerousness in a particular case, they (or defense counsel on cross-examination) can only advance a challenge to the asserted "expertise" of the prosecution psychiatrist. The likely result, therefore, is that the jury will hear not the traditional battle of expert conclusions, but only a dispute over one expert's ability

to reach the conclusion that he did. In that situation it remains all too easy for the jury to avoid its difficult sentencing decision by seeking refuge in the only "medical" conclusion concerning dangerousness that is before it.

In sum, psychiatric predictions of long-term future dangerousness have little or no probative value and yet exact an incalculable cost in prejudice to a capital defendant. Amicus submits that under these circumstances the constitutional calculus is clearcut: except where restricted to testifying as essentially lay witnesses, psychiatrists should be prohibited from advancing predictions of long-term future violent behavior at the sentencing stage of a capital case.

II. At a Minimum, Psychiatrists Should Not Be Allowed to Offer Medical Opinions Concerning the Likelihood of Long-Term Future Dangerousness Unless They Have Conducted an In-Depth Psychiatric Examination of the Defendant.

Even if this Court determines that psychiatric testimony in this area has sufficient predictive value to outweigh its prejudicial impact, the psychiatric testimony given in this case was constitutionally defective for the separate reason that it was elicited on the basis of a hypothetical question. In our view, the use of hypothetical questions is no substitute for an in-depth psychiatric examination and evaluation, particularly where the consequences of an incorrect diagnosis and prediction are so obviously grave.[15]

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[15] We recognize that there are times when psychiatric testimony may not be based on an examination of the defendant—for instance, when a psychiatrist testifies concerning an individual's mental state at the time he executed a will. In such circumstances, the psychiatrist must make reasonable efforts to secure the requisite facts by relying on external information, including medical records, where available, and information derived from third parties. While such an approach is doubtless less reliable than testimony based on an examination, it is essentially a "best evidence" accommodation

It is apparent from the testimony in this case that the key factor relied on by the psychiatrists in making their prediction of future dangerousness was their diagnosis of antisocial personality disorder—a diagnosis which, in their view, means that petitioner is, and necessarily will remain, a criminal recidivist.[16] That diagnosis, however, cannot be made on the basis of the evidence presented. The same evidence fails to disprove other diagnoses that clearly do not indicate a general propensity for violent behavior and, in contrast to antisocial personality disorder, may be amenable to effective treatment.[17] Moreover, the evidence relied on for the diagnosis in this case was insufficient even to satisfy the basic criteria for antisocial personality disorder, much less to rule out alternative disorders. In short, hypothetical questions serve only to further distort the factfinding process in capital cases

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where the individual is unavailable and yet some determination must be made. In the capital sentencing situation, by contrast, the external information available is controlled by the prosecutor. Indeed, in the present case it appears that the psychiatrists did not even attempt to examine petitioner; nor did they look at the results of a psychological test that had been performed on petitioner in connection with a previous proceeding. *See* transcript of hearing on petitioner's federal district court habeas petition, *Barefoot v. Estelle*, Civil Action No. W-81-CA-191 (July 28, 1982) (W.D. Tex.). Where the death penalty is at issue, far greater efforts and reliability should be demanded. See pages 24-25 *infra*.

[16] For the reasons stated in the first part of this brief, amicus believes that no mental illness or disorder—antisocial personality disorder included—is reliably predictive of future violent or assaultive behavior. Our argument here of course assumes that the Court determines otherwise and finds that psychiatrists may offer testimony purporting to predict violent behavior on the basis of a diagnosis of antisocial personality disorder.

[17] This is not to suggest that any treatment can "cure" an individual's propensity toward violence. There are, however, established treatments for illnesses such as schizophrenia, depression, and alcoholism which might have a bearing on future behavior in a way that decreases the likelihood of violence. Such a consideration would obviously be relevant to a jury.

because they fail to provide sufficient information to make the diagnosis that forms the basis for the ultimate prediction.[18]

Although hypothetical questions in this context may contain sufficient information to render an opinion which is consistent with the assumed facts, they do not contain sufficient information to render that opinion with any reasonable degree of medical certainty. The psychiatric diagnostic technique is essentially an inductive process. *See* A. Elstein, L. Shulman, & S. Sprafka, *Medical Problem Solving: An Analysis of Clinical Reasoning* (1978). Beginning with a list of possible explanations for particular symptoms or complaints, psychiatrists are taught to ask patients a series of questions, the answers to which will rule out some possible explanations and increase the likelihood that other explanations account for the phenomenon—for example, a psychotic disorder, alcoholism, or depression.

As the examination proceeds, the psychiatrist builds on answers to past questions. In this manner, the range of possibilities is narrowed and the questions become increasingly specific. By focusing questions in a particular area, the psychiatrist searches for crucial additional data that will confirm or exclude one or more of the remaining possible explanations. Thus, for example, the explanation of psychosis is rendered unlikely by the determination that the patient has not experienced delusions or hallucinations. And determining whether the patient has had such

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[18] Assuming that, contrary to the position stated in the first section of our brief, psychiatric testimony may be used in capital sentencing on the issue of future dangerousness, we believe that a defendant's use of such testimony should be conditioned on his participation in an examination by prosecution psychiatrists. This Court intimated as much in *Estelle v. Smith, supra*, 101 S. Ct. at 1874 n. 10, 1878. This would eliminate the need for the prosecution to rely on hypotheticals where the defendant himself presents psychiatric testimony in an attempt to rebut the prosecution's claim of future dangerousness.

hallucinations or delusions generally requires careful questioning.

Ideally this inductive process leads eventually to the identification of a single explanation that is both supported by the existing data, and not disproven by the answers to the questions asked. Where this is not the case, and two or more possible explanations remain, the medical expert may still be able to make a judgment as to which of these possibilities is most likely, depending on the specificity of the data that has already been collected. In the clinical setting, this tentative diagnosis may then be further refined on the basis of the patient's observed response to the treatment plan that is adopted.

Viewed in this context, the diagnostic technique employed by the prosecution psychiatrists in this case is completely unacceptable. Although the diagnosis offered by Drs. Holbrook and Grigson was not inconsistent with the facts provided in the hypothetical, the prosecutor's question contained no information that would have permitted the psychiatrists to rule out other mental disorders—that is, possible alternative explanations for the behavior described. In this connection it should be noted that the standard diagnostic criteria for antisocial personality disorder include a determination that the patient is not suffering from schizophrenia or manic-depressive episodes. *See* American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 321 (3d ed. 1980). However, little if any of the data stated in the hypothetical question related at all to these alternative disorders, and nothing whatever in the hypothetical could have provided a basis for excluding them.

It is thus apparent that the psychiatrists not only assumed as true the facts given in the hypothetical, but that they also assumed the nonexistence of unstated facts that might have pointed to a different conclusion. For example, both Dr. Holbrook and Dr. Grigson presumably assumed that petitioner had no history of delusions or

hallucinations—symptoms that might have suggested the alternative diagnosis of schizophrenia—simply because the hypothetical question contained no information in that regard. There was no basis for that assumption, as far as the record indicates. Of course, whether or not petitioner had in fact suffered from such symptoms could have been determined on the basis of a psychiatric examination.

Not only was the evidence presented in the hypothetical insufficient to rule out alternative diagnoses, it was also insufficient to meet the basic criteria for the diagnosis offered. *See* American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders, supra,* at 320-21. The first, and perhaps most important, of these criteria is a history of severe antisocial behavior before age fifteen. However, a close reading of the hypothetical question given in this case discloses no information whatever about petitioner before age twenty-four. On this basis alone the diagnosis rendered by the prosecution psychiatrists is highly questionable. By conducting an examination, in contrast, this relevant information could have been readily ascertained.

The second criterion for a diagnosis of antisocial personality disorder requires positive findings of at least four of the following manifestations of antisocial behavior: (1) inability to sustain consistent work behavior; (2) lack of ability to function as a responsible parent; (3) failure to accept social norms with respect to lawful behavior; (4) inability to maintain enduring attachment to a sexual partner; (5) irritability and aggressiveness as indicated by repeated physical fights or assaults; (6) failure to honor financial obligations; (7) failure to plan ahead or impulsivity; (8) disregard for the truth as indicated by repeated lying; and (9) recklessness, as indicated by driving while intoxicated. *Ibid.*

Despite its considerable length, the prosecutor's hypothetical question in this case contained information regarding *only two* of these manifestations. Specifically,

the hypothetical recounted petitioner's past criminal behavior (evidencing the third manifestation), and also described certain deceitful and manipulative conduct occurring shortly before the murder (evidencing the eighth manifestation). Although petitioner's actual history may well have evidenced additional manifestations of antisocial behavior, the hypothetical question simply provided no basis for this assumption. Again, such diagnostic information could have been obtained—and undoubtedly would have been obtained—on the basis of a psychiatric examination.

The last criterion for a diagnosis of antisocial personality disorder requires the finding of an uninterrupted pattern of antisocial behavior from age fifteen to the time of the diagnosis. *Ibid.* As stated above, the prosecutor's hypothetical question contains *no* data at all concerning petitioner's behavior before age twenty-four—the period that is perhaps the most important for this diagnosis. Accordingly, the medical opinions of the prosecution psychiatrists fail to meet this last criterion as well.

To be sure, Drs. Holbrook and Grigson did not purport to be strictly applying these generally established diagnostic criteria. Leaving aside the question whether these witnesses should have been permitted to define antisocial personality disorder as they pleased, their testimony fares little better even under their own homemade criteria. Dr. Holbrook, for instance, defined a sociopath as "one who continues to demonstrate from early life into adulthood antisocial behavior." (Tr. 2098). He also stressed the failure to establish "loyalties to the normal institutions such as family, friends, politics, law or religion," and explained that through the manipulation of other people the criminal sociopath succeeds in "enhancing [his] own ego image . . . . It makes [him] feel good." *Ibid.*

Again, the hypothetical question contains little, if any, information that would permit Dr. Holbrook to ascribe these characteristics to petitioner. As stated, the hypo-

thetical is completely silent with respect to petitioner's behavior, antisocial or otherwise, during his "early life." Similarly, the information stated by the prosecutor said virtually nothing about petitioner's loyalties to family, religion, or other institutions. Nor is there any basis in the hypothetical question for Dr. Holbrook's assertions regarding the motives underlying petitioner's assertively manipulative conduct. Without an opportunity to interview petitioner, it would ordinarily be impossible to say what sorts of activities he derived pleasure from.

Dr. Grigson also gave his own criteria for determining whether or not someone has an "antisocial personality disorder." (Tr. 2128). Dr. Grigson stated that the most "outstanding characteristic" of persons fitting this diagnosis is the complete "lack of a conscience"—a deficiency that, in his view, causes such persons to be "only interested in their own self pleasure [and] gratification." *Ibid.* Indeed, it appears that a defendant's conscience, or lack thereof, is virtually the only consideration for Dr. Grigson's diagnosis of antisocial personality disorder; he ascribes relatively little weight to a defendant's past criminal behavior.[19]

A determination concerning an individual's lack of conscience is especially dependent on an in-depth psychiatric examination. It involves a subtle exploration into individual motive, gratification, and need across a wide spectrum of thoughts and activities. What little information was stated concerning petitioner's capacity for remorse, guilt, and similar emotions was wholly insufficient to conclude that petitioner was without a "conscience." Nor was there any basis for the inferences concerning the motives for petitioner's manipulative behavior. In the

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[19] In *Estelle v. Smith, supra,* for example, Dr. Grigson concluded that the defendant was "a severe sociopath" even though his only prior criminal conviction had been for possession of marijuana. 101 S. Ct. at 1870 n. 4, 1871.

absence of an examination, Dr. Grigson simply could not have known whether such activity was a source of gratification to petitioner or, if so, whether that was the only reason that he engaged in such activity.

The deficiencies in the psychiatric testimony in this regard will not be cured by improving or expanding on the hypothetical question format employed by the prosecution. It is inconceivable that the record in a criminal case can contain the type of diagnostic data needed to construct a hypothetical that would allow the rendering of a valid psychiatric opinion concerning antisocial personality disorder or related illnesses. Unless he has access to information derived from an in-depth psychiatric examination, a prosecutor is simply unable to state whether the defendant has experienced hallucinations or delusions, or to provide other diagnostic information minimally necessary to reach a reasonable psychiatric conclusion.

For many of the same reasons, cross-examination or rebuttal witnesses are not an adequate response to the problem posed by the use of hypotheticals in a capital sentencing proceeding. Since the information provided is so limited, a rebuttal psychiatrist cannot establish a contradictory diagnosis; at best he is reduced to contesting the first psychiatrist's ability to make the diagnosis that he did. Obviously cross-examination offers even less of an opportunity to dispute the initial diagnosis. The jury is thus left with only one opinion, challenged as to the adequacy of its basis but not as to its accuracy. Such a situation is necessarily biased against the defendant.

In sum, the inadequate procedures used in this case allow a psychiatrist to masquerade his personal preferences as "medical" views, without providing a meaningful basis for rebutting his conclusions. In a capital sentencing case the gravity of the jury's decision demands that its deliberations not be distorted by such practices.

CONCLUSION

For the foregoing reasons, amicus the American Psychiatric Association respectfully submits that the decision below should be reversed.

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Case No. 82-6080

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

THOMAS A. BAREFOOT,

Petitioner,

v.

W. J. ESTELLE, JR., Director,

Texas, Department of Corrections

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

BRIEF OF AMICI CURIAE STATE OF FLORIDA, ET AL

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QUESTION PRESENTED

WHAT IS THE APPROPRIATE STANDARD FOR GRANTING OR DENYING STAY OF EXECUTION PENDING DISPOSITION BY FEDERAL COURT OF APPEALS OF APPEAL BY DEATH-SENTENCED FEDERAL HABEAS CORPUS PETITIONER?

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INTEREST OF AMICI CURIAE

The above listed states, through their attorneys general, respectfully offer this brief in support of Respondent W. J. Estelle, Jr., Director, Texas Department of Corrections. The Amici will all be affected by the decision of this case since each of the states represented by the respective attorneys general are states which have enacted the death penalty. Each has or will be plagued by requests for last minute stays of scheduled executions and each has a legitimate interest in the finalty of its judgments.

SUMMARY OF ARGUMENT

A stay of execution should not be granted by a Court of Appeals unless the death sentenced habeas petitioner demonstrates through an appropriate detailed application for stay that he has a substantial federal question in which he has a fair likelihood of success.

The fact that a certificate of probable cause has been granted by either a District or Circuit Judge should not suffice to dispense with this requirement. As this court has recognized, despite issuance of a certificate, an appeal may be frivolous. Comity and interests in finalty require that requested stays of valid state court judgments should be denied except for compelling reasons.

If no certificate of probable cause is issued then the death sentenced habeas

petitioner is not entitled to an appeal and no stay should be granted. If, however, one has issued, this should not call for an automatic stay of the state judgment. By requiring the habeas petitioner to file a sufficiently detailed application for stay demonstrating a likelihood of success, a court of appeals will be compelled to follow the precepts of *Garrison v. Patterson*, 391 U.S. 464, that is, determine whether there is a likelihood of success, and if not, summarily decide the appeal.

Compliance with the limited briefing, allowed a petitioner under *Garrison* once a certificate of probable cause is granted, would be met by the requirement of a detailed application for stay setting out the issues and reasons why petitioner believes there is a likelihood of success.

By virtue of its decision in the instant case, so announcing this requirement, all future death sentenced petitioners will be thereafter on notice that after a death warrant is signed or execution date is otherwise set, opportunity to address the merits on appeal will or may be limited if they, unnecessarily, wait until the last minute within which to seek habeas relief.

ARGUMENT

A FEDERAL APPEALS COURT SHOULD DENY A MOTION FOR STAY OF EXECUTION UNLESS A DEATH SENTENCED PETITIONER DEMONSTRATES THAT HIS APPEAL PRESENTS A SUBSTANTIAL FEDERAL QUESTION IN WHICH HE HAS A FAIR LIKELIHOOD OF SUCCESS.

In *Brooks v. Estelle*, 51 L. W. 3469 Justices Brennan, Marshall and Stevens, dissenting, opined that whenever a certificate of probable cause is issued a stay of execution should inexorably follow. With deference, amici submit that this is an improper criterion for determining whether a stay of execution should be granted. We will suggest what we believe should be a proper standard. But first we will point out why we believe that the issuance of a certificate of probable cause should not be the gauge by which a federal appellate court determines whether to issue a stay of execution in a death case.

THE CERTIFICATE OF PROBABLE CAUSE

The function of a certificate of probable cause is to allow an appeal to proceed where the detention complained of arises out of process issued by a State Court. Title 28 U.S.C. §2253, Federal Appellate Rule 22, *Nowakowski v. Maroney*, 368 U.S. 542 (1967). The function of a stay is to hold in abeyance the judgment and sentence of the state court.Title 28 U.S.C. §2251. Thus it is in the nature of a preliminary injunction *Mulligan v. Zant*, 531 Fed. Supp. 458 U.S.D.C.M.D. Ga. 1982). If issuance of a certificate were the correct gauge by which to determine whether to stay the judgment of a state court then all habeas petitioners would be entitled to release from custody pending their habeas appeal.

It is one thing to grant a certi-

ficate and thus allow an appeal where the appeal is not frivolous or totally without substance, *Alexander v. Harris*, 595 F. 2d 87 (2nd Cir. 1979); quite another, to enjoin a state judgment or sentence simply because a certificate has issued. Respectfully, we suggest that while a certificate of probable cause is supposedly not granted where the appeal is frivolous or without substance [1] all too often, in practice these

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1 Apparently this Court has not spoken on the question as to what is probable cause for the issuance of a Certificate and all too often they have been issued routinely or simply because the appeal is not frivolous. Allowance of In Forma Pauperis Appeals in §2255, and Habeas Corpus cases by Justice, then Judge Blackmun, 43 F.R.D. 343. Were this Court to address this broader question and restrict this issuance to a much greater degree than is now the practice (such as only upon a showing of a substantial federal question upon which

certificates are issued perfunctorily. Fed. R. App. P. 22 requires the District Judge to state the reasons why a certificate should not issue. It is far easier for a busy District Judge to grant a certificate than to issue an order detailing why one should not be granted. We do not imply a cavalier attitude on the part of judges in issuing certificates of probable cause. What we do say is that the system

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appellant might well prevail) it would, we submit come closer to the Congressional intent in enacting Title 28 U.S.C. §2253, greatly reduce the number of frivolous appeals, and provide the opportunity for more thoughtful analysis of those remaining. But, that is not the question upon which the Court granted certiorari. Resolution of the standard for issuance of a certificate of probable cause requires amplifications beyond the scope of the instant question.

and the realities of life encourage issuance of certificates to the point where they are routinely granted irrespective of the lack of merit to the appeal. 2/

In fact, this Court has recognized that despite the issuance of a certificate of probable cause, an appeal may be frivolous, *Carafas v. LaValle*, 391 U. S. 234, 242 (1968). This recognition is the first step towards the realization

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2/ Moreover, Fed. R. App. p. 22 (b) provides that if no express request for a certificate is filed, the notice of appeal is a sufficient request addressed to the judges of the Court of Appeals (which may be considered by a Circuit Judge). We fail to see how a Circuit Judge can determine whether or not an appeal is meritorous or frivolous simply by a review of the notice. Should issuance of a stay of execution rest on such a procedure?

that, in practice, certificates of probable cause impede rather than advance the quest for an end to ligation. This is because although an appeal from a denial of a petition for writ of habeas corpus is not a right [as in a direct criminal appeal, Fed. R. App. P. 4(b)], once a certificate of probable cause is granted, the appeal cannot be dismissed as frivolous. It must be considered on it's merits. *Carafas* supra, *Nowakowski*, *Garrison* infra. Thus, although collateral in nature, habeas appeals enjoy even greater protection than direct appeals in criminal cases, which may be dismissed because frivolous. *United States v. Rogers*, 481 F. 2d 896 (5th Cir. 1973) cert. denied.

Comity and federalism require more deference to state court judgments than is being afforded by such a system. After

all, federal habeas is not, as some would have us believe, an extension of the state appellate system. Stays of state court processes are seldom part of the criminal justice system and should not be made compulsory or automatic by a procedure which holds them in such little regard. As observed in *Mulligan v. Zant*, supra:

> "Petitioner is not justified in presuming that such a drastic measure as staying an order of a state court of competent jurisdiction will be a natural course of events simply because he is attacking a sentence of death."
>
> (Text 459)

For a District Judge to issue a certificate of probable cause ". . . solely for the purpose of allowing the petitioner to proceed through the appellate process . . ." without regard to likelihood of success or merit to

the appeal [as occurred in *Dobbert v. Wainwright*, 532 F. Supp. 545, 563 (1982)], to be inexorably followed by a stay, is to invite unnecessary friction between the states and federal courts. This friction is exacerbated when the Court of Appeals grants a stay even before the District Judge has finished with the case as occurred in *Ford v. Strickland*, Case No. 81-6663-Civ. NCR, United States District Court, Southern District of Florida, as evidenced by the following excerpt from the Court's Oral Findings of Fact and Conclusion of Law (unpublished):

> "I have disussed the matter with a judge in the Eleventh Circuit, advised him after everything was done here and I had arrived at a conclusion what my conclusion was. He said, we will give you time to announce your findings and conclusions from the bench, and then in order to permit the Defendant to receive an effective appellate review they would enter a stay. Ap-

> parently, that may well have been done. And the execution scheduled for tommorrow morning, I'm advised, has been stayed by the Eleventh Circuit. And the burden is upon the Attorney General's Office of the State of Florida to notify the warden of that. It is not on this Court. They made it abundantly clear the Court of Appeals, that this administrative matter had to be carried out because they were concerned that if they issued the stay after 5:00 o'clock, they might have some difficulty in making sure that the stay were effectively communicated, and that, of course, the Attorney General's Office can do, and I direct that you do that."

Or, as occurred in *Goode v. Wainwright*, 670 F. 2d 941 (11th Cir. 1982) not only was that particular execution stayed but in effect all death cases down the line were held in abeyance simply because the appellate court was critical of the District Court's reliance on District Court decisions which were currently pending appeal in the Eleventh Circuit —— all of which unanimously held

the issue to be without merit. Compare: *Rosota v. Warden, California State Prison*, 391 U.S. 543 (1963), Harlan, J. (pendency, on certiorari, of an issue does not necessarily justify delaying state judgment.)

We recognize that this Court has held that once a habeas petitioner persuades an appropriate tribunal that probable cause for appeal exists he must be afforded an opportunity to address the underlying merits, *Nowakowski*, supra, *Garrison v. Patterson*, 391 U.S. 464 (1968), but in *Garrison* this Court also stated:

> "As we only recently noted in Carafas v. LaValle, 391 US 234, at 242, Nowakowski does not prevent the courts of appeals from adopting appropriate summary procedures for final disposition of such cases. Carafas requires the courts of appeals to give sufficient indication that an appeal has been disposed of on the merits, but nothing in Nowakowski and nothing we say here prevents the courts of appeals from considering the questions of prob-

> able cause and the merits together, and nothing said there or here necessarily requires full briefing and oral argument in every instance in which a certificate is granted. We hold only that where an appeal possesses sufficient merit to warrant a certificate, the appellant must be afforded adequate opportunity to address the merits, and that if a summary procedure is adopted the appellant must be informed by rule or otherwise, that his opportunity will be limited. Within this general framework, the promulgation of specific procedures is a matter for the courts of appeal."
>
> (391 U.S.446-447)

Consequently, while a habeas petitioner may persuade a District Judge to issue a certificate of probable cause it does not necessarily follow that because the certificate was granted that there is a high or even fair likelihood that the habeas petitioner will be successful in his appeal. It may be entirely possible for a court of appeals to fully consider the merits of the appeal through a sum-

mary proceeding without the necessity of issuing a stay of execution. In most death cases the issues have been throughly briefed time and again at state court and District Court level. Little more should be required of an appellate court after a review of the proceedings below in order to approve the District Judge's findings and conclusions.

It is manifest then, that even after a certificate of probable cause has been granted, a stay of execution should not automatically follow. A court of appeals should make an independent examination to determine the need for a stay of the state court judgment.

THE PROPER STANDARD

What then is the proper standard that a circuit court of appeals should apply in determining whether to grant a stay of execution?

A proper standard is one which demonstrates a deference for the state court judgment and at the same time assures that all meritorious appeals are considered to the extent necessary to assure that no sentence of death is imposed in violation of the constitution.

Since, as we have suggested, a stay is in the nature of a preliminary injunction the same considerations generally should be given to it. In passing upon whether to issue a stay in a death case, the Fifth Circuit recently set out what must be considered in determining whether to grant a stay:

> "(1) whether the movant has made a showing of likelihood of success on the merits, (2) whether the movant has made a showing of irreparable injury if the stay is not granted, (3) whether the granting of the stay would substantially harm the other parties, and (4) whether the granting of the stay would serve the public interest."
>
> * * * * * * * * * *
>
> "While "the movant need not, always show a 'probability' of success on the merits," he must "present a substantial case on the merits when a serious legal question is involved and show that the *balance of the equities,* [i.e., the other three factors] *weighs heavily in the favor of granting the stay."*
>
> *O'Bryan v. Estelle*, 691 F. 2d 706,708 (5th Cir. 1982)

We most respectfully submit that the Fifth Circuit comes closer to espousing the correct standard. It recognizes the national policy of forbidding federal courts from enjoining state proceedings except under special circum-

stances, *Younger v. Harris*, 401 U.S. 37 (1971), by requiring some showing of probability of success not unlike what is required for bail pending habeas review. *Aronson v. May*, 85 S. Ct. 3, 13 L. Ed. 2d 6 (1964), *Calley v. Callaway*, 496 F. 2d 701 (1974). In *Aronson*, Mr. Justice Douglas opined as follows:

> Second: This applicant is incarcerated because he has been tried, convicted, and sentenced by a court of law. He now attacks his conviction in a collateral proceeding. It is obvious that a greater showing of special reasons for admission to bail pending review should be required in this kind of case than would be required in a case where applicant had sought to attack by writ of habeas corpus an incarceration not resulting from a judicial determination of guilt. Cf. Yanish v. Barber, 97 L. Ed. 1637, 73 Sup. Ct. 1105 (1953). In this kind of case it is therefore necessary to inquire whether in addition to there being substantial questions presented by

> the appeal, there is some circumstance making this application exceptional and deserving of special treatment in the interests of justice. See Benson v. California, 328 F. 2d 159 (CA 9th Cir. 1964). The papers before me on this application indicate the existence of no such circumstance."

Indeed, it is similar to the standards followed by the Justices of this Court in determing whether to grant a stay of a state court judgment pending application for certiorari. As Mr. Justice Powell stated in *White v. Florida*, 73 L. Ed 2d 1385, 1386(1982):

> "[T]here must be a reasonable probability that four members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari or the notation of probable jurisdiction; there must be a significant possibility of reversal of the lower court's decision; and there must be a likelihood that irreparable harm will result if that decision is not stayed." Times-

Picayune Publishing Corp. v. Schulingkamp, 419 US 1301, 1305, 42 L. Ed 2d 17, 95 S.Ct. 1 (1974) (Powell, J. in chambers).

(Emphasis Supplied)

If a certificate of probable cause is not granted then, of course, the habeas peititioner is not entitled to an appeal and no consideration need be given as to whether or not to grant a stay. If, however, one is granted be it by a District or Circuit Judge that should not end the inquiry with respect to holding the state judgment in abeyance.

While, as we have suggested, the Fifth Circuit's standard comes closer to being the correct one, we submit it does not go far enough. It implies that simply because a substantial federal question is presented a stay should be granted.

It fails to recognize that an appeal may present a substantial federal question yet likelihood of success be minimal at best. For example, consideration of a Fourth Amendment question may be precluded by *Stone v. Powell*, 428 U. S. 465 (1976) or a Fifth Amendment one by *Wainwright v. Sykes*, 433 U. S. 72 (1977). An appealing habeas petitioner should be required to petition for a stay setting forth the question presented and the reasons why his appeal not only raises a substantial federal question, but that he has at least a fair likelihood of success.

If the appealing habeas petitioner fails to carry his burden of demonstrating a fair likelihood of success the court of appeals should deny the stay and proceed in the summary fashion suggested in *Garrison*, supra.

While *Garrison* prounounces that even when a court of appeals proceeds in a summary fashion ". . . the appellant must be afforded adequate opportunity to address the merits . . .", it also specifically states that neither full briefing nor argument is required in order to afford this opportunity. What then is sufficient briefing to satisfy *Garrison* ? We submit it is such as calls to the appellate court's attention the issues presented with some supporting argument. An application for stay that sets out the issues to be raised on appeal and attempts to demonstrate a likelihood of success would, we suggest, suffice. From such an application a court of appeals can determine not only likelihood of success, but, additionally, if success is unlikely, the merits of the appeal.

Garrison also requires notice to the appellant that his opportunity to address the merits will or may be limited. If this Court holds as we suggest, and so announces, that *Garrison* requirement will have been met. Thereafter all death sentenced prisoners will be on notice that after a death warrant is signed or an execution date is otherwise set opportunity to address the merits on appeal will or may be limited, depending on their demonstrating a likelihood of success. This will encourage those with valid claims to proceed expeditiously and not wait until the eleventh hour to seek habeas relief.

There may be situations where time does not permit a detailed application and because of "hydraulic pressures" *Evans v. Bennett*, 440 U.S. 1301, (1979) (Renquist J.) imposed upon it, a Court

of Appeals may find it impossible to make its determination as to likelihood of success in the time remaining between the application and scheduled execution. In such circumstances, it would probably be appropriate to grant a temporary stay.

But the stay should be of the most temporary nature, only so long as it is absolutely necessary to allow a detailed application for stay and for the court of appeals to decide the basic question involved i. e. whether there is a sufficient likelihood of success in the appeal to grant the appellant a further stay pending full appellate review. If the appealing habeas petitioner fails to demonstrate a likelihood of success the federal court of appeals should dissolve its temporary stay and proceed in the summary fashion suggested in *Garrison*.

One further comment with respect to *Garrison*. The problem with *Garrison* is that while it provides a general framework for Courts of Appeal to proceed summarily, even when a certificate or probable cause has been granted, it does not compel a Court of Appeals to do so. 3/ Consequently, once a certificate

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3/ In fact since Garrison was decided in 1968, there appears to be only two circuits that have utilized its suggested procedure, the Fifth Circuit in the instant case and the Tenth Circuit in *Green v. Turner*, 409 F. 2d 215 (1969).

has been granted a full appeal must be afforded unless the Court of Appeals decides to proceed as *Garrison* suggests. Unless a Court of Appeals so decides a stay will inevitably follow. But, by having the issuance of the stay dependent, not upon the granting of a certificate (as freely as they are granted) but upon a proper application for stay, as we have suggested, a Court of Appeals will properly be compelled to apply the guidelines of *Garrison* in all capital cases whenever time is of the essence.

This standard which amici espouse is particularly appropriate with respect to successive petitions for writs

of habeas corpus. 4/ Anyone that does not recognize that death row inmates have and will file successive and last minute habeas petitions is simply whistling in the wind. These last minute petitions are purposely lenghthy, confusing, vague and complex with little regard to merit, designed to bring about the "hydraulic pressures" about which Mr. Justice Rehnquist lamented in *Evans v. Bennett*, supra and thus cause a last minute stay. The filing of a successive petition together with its eleventh hour timing should be considered to weigh heavily against the petitioner and require him to show an even greater likelihood of success.

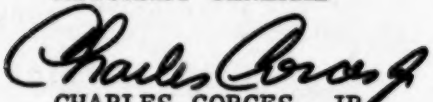
4/ Bailey v. Oliver, 695 F. 2d 1323 (1983) 11th Cir., an example of the abuses that can arise through successive petitions for writs of habeas corpus. In Bailey, a non-capital case, a single circuit judge granted a certificate of probable cause for the third time.

CONCLUSION

The practice which has thus far evolved in many circuits of granting stays of execution simply to give the habeas petitioner his desired appeal, is in need of drastic curtailment by this Court. There have been only two involuntary executions in this country since this Court upheld the constitutionality of the death penalty in 1976, attributable in substantial part to the present system. While what Amici suggest may not totally solve the problem of a constitutionally valid punishment being obstructed by endless procedural delays, it will at least eliminate some of the most egregious abuses.

Respectfully Submitted,

JIM SMITH
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I, CHARLES CORCES, JR., Counsel for Amici and a member of the Bar of the United States Supreme Court, hereby certify that on the 29 day of March, 1983, I served three copies of this Brief of Amici Curiae on William Gray, Esquire, Attorney at Law, 2038 Lexington Avenue, Houston, Texas, 77098, counsel for Petitioner Barefoot and three copies of this brief of Amici Curiae on Douglas Becker, Assistant Attorney General, State of Texas, P. O. Box 12548, Austin, Texas, 78711 by a duly addressed envelope with postage prepaid.

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No. 82-6080

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

THOMAS A. BAREFOOT,
Petitioner,

v.

W. J. ESTELLE, JR., Director,
Texas Department of Corrections,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF *AMICUS CURIAE* NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

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QUESTIONS PRESENTED

(1) Whether the Fifth Circuit applied an inappropriate standard in denying a stay of execution, necessitating reversal by this Court.

(2) Whether this Court should adopt a standard which requires the granting of a stay in all cases in which a death-sentenced prisoner's constitutional claims upon a first federal habeas corpus appeal are not legally frivolous.

(3) Whether the introduction of the "hypothetical" testimony of Doctors Grigson and Holbrook severely undermined the reliability of the fact-finding process at petitioner's penalty trial, in violation of his rights under the Eighth and Fourteenth Amendments.

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NO. 82-6080

IN THE

SUPREMF COURT OF THE UNITED STATES

October Term, 1982

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THOMAS A. BAREFOOT,

Petitioner,

v.

W. J. ESTELLE, JR., Director,
Texas Department of Corrections,

Respondent.

==========

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

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BRIEF OF AMICUS CURIAE NAACP LEGAL DEFENSE
AND EDUCATIONAL FUND, INC.

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STATEMENT OF INTEREST OF AMICUS CURIAE

The NAACP Legal Defense and Educational Fund, Inc., is a non-profit corporation

established to assist black citizens in securing their constitutional rights. In 1967, it undertook to represent indigent death-sentenced prisoners for whom adequate representation could not otherwise be found. It has frequently represented such prisoners before this Court. E.g., Furman v. Georgia, 408 U.S. 238 (1972); Estelle v. Smith, 451 U.S. 454 (1981); Enmund v. Florida, ___ U.S. ___, 73 L.Ed.2d 1140 (1982). The Fund has also appeared before this Court as amicus curiae in capital cases. E.g., Witherspoon v. Illinois, 391 U.S. 510 (1968); Gregg v. Georgia, 428 U.S. 153 (1976); Adams v. Texas, 448 U.S. 38 (1980).

The Legal Defense Fund currently represents a substantial number of indigent condemned prisoners in the states of the Fifth Circuit and elsewhere, including several who are at various stages of

federal habeas corpus proceedings. It is frequently called upon, and it tries to the extent of its capacities, to provide consultative assistance to attorneys representing other capital defendants in the Fifth Circuit and across the nation.

The issues presented by this case are of the utmost concern to all death-sentenced prisoners throughout the country, including many represented by the Fund. Consent has been granted by both petitioner and respondent for the filing of this amicus curiae brief.

STATEMENT OF THE CASE

I. Proceedings In The State Courts

A. The Trial

On November 17, 1978, after a jury trial in the 27th Judicial District Court of Bell County, Texas, petitioner Thomas A.

Barefoot was convicted of capital murder for the August 7, 1978 homicide of Carl LeVin, a Harker Heights, Texas, police officer.

On Monday, November 20, 1978, a penalty trial commenced before the same jury pursuant to Tex. Code Crim. Pro. Art. 37.071[1/]. At this proceeding it was established that petitioner had the following previous criminal convictions: (i) possession of marijuana and unlawfully carrying a weapon (November 26, 1974, Fifteenth District Court of Lafayette Parish, Louisiana) (sentence: six months imprisonment); (ii) possession of amphetamines and distribution of marijuana (Decem-

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1/ In such a proceeding the State has the burden of proving beyond a reasonable doubt that the answer to each of the following questions is "yes":

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the

[footnote 1/ continues on next page]

ber 2, 1974, Fifteenth District Court of Lafayette Parish, Louisiana) (sentence: five years in prison, probated; one year in the parish jail); and (iii) possession of an unregistered firearm (a sawed-off shotgun) (October 24, 1975, United States District Court for the Western District of Oklahoma) (sentence: one year imprisonment). See SF 2112-13.[2/] At the guilt stage the prosecution also presented evidence that on January 9, 1978, petitioner

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1/ continued

reasonable expectation that the death of the deceased or another would result;

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

A "yes" answer to all three questions results in a mandatory sentence of death.

2/ Numbers preceded by "SF" refer to pages of the Statement of Facts of petitioner's trial.

had escaped from a jail in Valencia County, New Mexico, where he was being held on charges of statutory rape and unlawful restraint of a minor child by force or deception with intent to commit criminal sexual penetration against the child's will. See SF 2120-21.[3/]

The prosecution called several reputation witnesses at the penalty trial, from sites in Kansas, Louisiana, Oklahoma, New Mexico, and Texas. They testified that petitioner's reputation for being a peaceful and law abiding citizen was bad in their respective communities. See Barefoot v. State, 596 S.W.2d 875, 888 (Tex. Crim. App. 1980).

3/ The introduction into evidence of these extraneous alleged offenses, never adjudicated in the New Mexico courts, led two judges of the Texas Court of Criminal Appeals to vote for reversal of petitioner's conviction and sentence. They argued that the allegations had only a "slight probative value" which was "far outweighed by heavy prejudice." Barefoot v. State, 596 S.W.2d 875, 889 (Tex. Crim. App. 1980).

Finally, the prosecution called two psychiatrists at the penalty phase, Doctors John T. Holbrook and James P. Grigson. Their testimony is summarized in Appendix A to this brief. It suffices to note here that both doctors diagnosed petitioner, without having examined him, as a severe sociopath who would commit future violent acts whether in prison or out, and that Dr. Grigson described the likelihood of petitioner committing such future violent acts as "one hundred percent and absolute." SF 2131.[4/]

On November 22, 1978, the jury answered "yes" to the statutory special issues which determine the sentence in Texas capital cases, and Thomas Barefoot was sentenced to die.

4/ Both Dr. Grigson and Dr. Holbrook had testified for the prosecution in numerous other Texas death penalty cases, repeatedly predicting future dangerousness of capital defendants. A summary of their known appearances is set forth in Appendix B to this brief.

B. The Appeal

On petitioner's appeal to the Texas Court of Criminal Appeals, his challenge to the admissibility of the testimony of Doctors Grigson and Holbrook was rejected. Barefoot v. State, 596 S.W.2d 875, 887 (Tex. Crim. App. 1981). On June 29, 1981, this Court denied certiorari. 453 U.S. 913 (1981) (Justices Brennan and Marshall dissenting).

C. The State Habeas Corpus Proceeding

On October 6, 1981, the state judge that presided over petitioner's trial issued a seven-page opinion recommending the denial of state habeas corpus relief without an evidentiary hearing. Among the claims specifically rejected on the merits was an attack upon the hypothetical testimony of Doctors Grigson and Holbrook as a violation of petitioner's rights under the Eighth and Fourteenth Amendments:

> The use of psychiatric testimony on the issue of dangerousness has been approved by the Supreme Court in Jurek vs. Texas, 428 U.S. 262 (1976) and Estelle vs. Smith, ____ U.S. ___ (1981) by necessary implication. The fact that the psychiatrists did not personally examine the Petitioner but rather testified on the basis of hypothetical questions goes to the weight and not the admissibility of the expert opinion. Barefoot vs. State, 596 S.W. 2nd 875 (Tex. Cr. App. 1980).

Ex Parte Barefoot, No. 26,812-A, order of Oct. 6, 1981, p. 6 (27th District Court of Bell County, Texas).[5/] The following day, the Texas Court of Criminal Appeals summarily denied state habeas corpus relief without opinion.

II. Proceedings In the Federal Courts

A. Proceedings In the District Court

The instant federal habeas corpus proceeding commenced on October 14, 1981, in the United States District Court for

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5/ This order appears in the record as Exhibit B to respondent's answer to petitioner's federal habeas corpus petition, district court docket record entry 20.

the Western District of Texas. An evidentiary hearing was held on July 28, 1982, before Hon. Lucius D. Bunton.

A summary of that hearing appears as Appendix C to this brief. For present purposes we note only that the opinions below do not accurately describe the testimony adduced. Specifically, petitioner's two experts repeatedly declined to offer any diagnosis of petitioner, and both stated that no such diagnosis could be made to a reasonable medical certainty without examining the patient. They also testified that it is impossible for doctors to predict long-term future dangerousness as a matter of scientific expertise.

Following the submission of proposed findings of fact and conclusions of law by both sides, Judge Bunton entered a 13-page opinion denying habeas corpus relief on

November 12, 1982. With respect to the issue concerning psychiatric testimony, Judge Bunton found -- tracking the language of the State's post-hearing submission verbatim[6/] -- that

> [B]ased upon the facts stated in the hypothetical question posed by the prosecutor at trial, all medical experts at the evidentiary hearing agreed with [the Grigson-Holbrook] ... diagnosis. Dr. Fred Fason, a psychiatrist who testified on behalf of Petitioner, testified that he was 90% sure that Petitioner was a severe antisocial sociopath who would commit future acts of violence dangerous to society. Dr. Wendell Dickerson, a psychologist, testified that he was almost 90% sure of the same decision. Dr. Richard Koons and Dr. Parker testified that they were extremely sure of the same conclusion.

Slip op. at 11. Judge Bunton further held that this Court had "specifically upheld the use of psychiatric testimony on the issue of future dangerousness as a matter

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6/ See Respondent's Proposed Findings of Fact and Conclusions of Law, district court docket record entry 40, p. 10.

that may be considered by the jury" in Jurek v. Texas, 428 U.S. 262 (1976), and Estelle v. Smith, 451 U.S. 454 (1981). Id. at 10.

On December 3, 1982, the district court ordered that a certificate of probable cause be issued pursuant to 28 U.S.C. § 2253 and F.R.A.P. Rule 22(b). On December 13, 1982, the court formally issued the certificate and further certified that petitioner was a pauper and that his appeal was being taken in good faith. However, on December 4, 1982, Judge Bunton granted respondent's motion to vacate the stay of execution entered at the commencement of the federal habeas corpus proceeding.7/

B. Proceedings In The Fifth Circuit

Following the denial of federal habeas

7/ Petitioner's counsel never specifically asked the district court for a stay pending appeal, as required by F.R.A.P. Rule 8(a), and the record is therefore silent as to how the district court would have ruled upon such a request.

corpus relief, the state trial court set an execution date for January 25, 1983.

Petitioner's application to the Fifth Circuit for a stay pending appeal was filed on Friday, January 14, 1983. 8/ The application stresssed the Eighth Amendment issue raised by the hypothetical predictions of future dangerousness rendered by Doctors Grigson and Holbrook; it cited decisions of other courts supporting petitioner's challenge to this kind of evidence; and it informed the court that the American Psychiatric Association was prepared to file an amicus curiae brief on the question in petitioner's appeal. (See Stay Application, Exhibit H, letter of January 14, 1983, from the Association's

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8/ The chronology of events between the setting of the execution date and the filing of the Fifth Circuit stay application is summarized in the Fifth Circuit application at pp. 1-4. That application was submitted to this Court as part of petitioner's application for a stay herein.

counsel to petitioner's counsel.)

At approximately 3 p.m. on Monday, January 17, 1983, the court of appeals scheduled oral argument on the stay application for Wednesday, January 19 at 9:00 a.m. in Houston, Texas, before a panel of Judges John R. Brown, Thomas M. Reavley, and E. Grady Jolly. On Tuesday, January 18, the State's papers in opposition to the stay were filed.

On the morning of Wednesday, January 19, Judge Brown was unavailable due to illness and was replaced on the panel by Judge Carolyn D. Randall. Judge Reavley advised counsel for both sides in open court that Judge Randall had not yet seen any of the papers filed. Oral argument took place on January 19 between approximately 9:30 a.m. and 11:00 a.m.

At oral argument, counsel for respondent submitted a copy of the transcript of the habeas corpus hearing conducted in the

district court,[9] and counsel for petitioner submitted four additional exhibits in support of the application for a stay. After oral argument, at approximately 12:10 p.m. on January 19, the court was provided with a copy of the stenographic record of petitioner's state court trial and sentencing hearing. That record is approximately 1400 pages long.

At about 1 p.m. the following day, Thursday, January 20, the Fifth Circuit issued a 16-page opinion denying a stay of execution. On the question of the admissibility of the psychiatric testimony, the court found that

> All of the experts have testified that the conduct of the peti-

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9/ The stenographer's certification indicates that this 258-page transcript was not completed until January 14, 1983. It had not been made available to petitioner's counsel prior to oral argument on the stay application. A representative of petitioner's counsel in Austin, Texas obtained a copy from the Texas Attorney General's office on the afternoon of January 20, after the court of appeals had denied the stay.

> tioner, to which the assumed facts adhered in the hypothetical question put to the psychiatrists at the original trial, was the conduct of a severe sociopath. They disagreed over the degree of certainty with which future conduct could be predicted, but this only shows a difference of opinion among professionals -- no rarity to the courts or to citizens who serve as jurors.

Slip op. at 7. The court believed that the admissibility of such hypothetical testimony had "by implication" been upheld in Jurek v. Texas, supra, and Estelle v. Smith, supra (id. at 9), commenting that

> if testimony by a mental health professional, trained to detect mental illness and personality types, is inherently unreliable on the issue of future dangerousness, then would not testimony and a decision by untutored lay persons on this issue be even more unreliable?

Id. at 10.

SUMMARY OF ARGUMENT

I. The Fifth Circuit's denial of a stay of execution pending appeal in this case was completely out of line with the approach

to stay applications followed in prior cases by the Fifth Circuit itself, by all other Circuits, and by this Court. The approach taken in this case would, if approved by this Court, thrust unnecessary and inordinate burdens upon the courts of appeals and this Court every single time an execution date is set following the denial of federal habeas corpus relief by a district court in a capital case. Worse yet, it would virtually guarantee that some mistakes will be made in the frenzied eleventh-hour proceedings which inevitably accompany stay applications, with the result that some death-sentenced prisoners whose habeas corpus appeals would have succeeded will nonetheless be executed without an appeal. The States suffer no irreparable harm in allowing a death-sentenced prisoner's first federal habeas corpus appeal to be heard on the merits; yet the harm to the prisoner is both

irreparable and of the greatest magnitude. A stay pending appeal should be granted unless the condemned prisoner's constitutional claims are legally frivolous.

II. The prosecution's use of the "hypothetical" testimony of Doctors Grigson and Holbrook at the penalty phase of petitioner's capital trial severely undermined the reliability of that proceeding. This testimony had no scientific basis whatsoever, yet the prosecution was allowed to parade it in front of a lay jury as a legitimate expert opinion addressing the very statutory question which the jury was required to answer in deciding whether petitioner would live or die. No prior decision of this Court supports the use of such testimony. To the contrary, the Court's repeated emphasis in recent years on the need for reliability in death-sentencing determinations requires that such testimony not be

permitted into evidence.

ARGUMENT

I

BECAUSE THE FIFTH CIRCUIT APPLIED AN INAPPROPRIATE STANDARD IN DENYING A STAY OF EXECUTION, THIS COURT SHOULD REVERSE AND ADOPT A STANDARD WHICH REQUIRES THE GRANTING OF A STAY IN ALL CASES IN WHICH A DEATH-SENTENCED PRISONER'S CONSTITUTIONAL CLAIMS UPON A FIRST FEDERAL HABEAS CORPUS APPEAL ARE NOT LEGALLY FRIVOLOUS

A. The Denial Of A Stay In This Case Represents A Departure From The Approach To Stay Applications Followed In Prior Cases By The Fifth Circuit Itself, By All Other Circuits, And By This Court

Following this Court's decisions in Gregg v. Georgia, 428 U.S. 153 (1976), and companion cases, individuals sentenced to death under the sorts of capital punishment statutes upheld therein began to enter the federal district courts seeking redress of asserted constitutional defects in their convictions and sentences, as is their right under the federal habeas corpus jurisdiction conferred by 28 U.S.C.

§2241 et. seq. Inevitably, these cases made their way to the federal courts of appeals. By our count, the courts of appeals have decided 41 post-Gregg capital habeas corpus cases to date, and approximately 60 more are now pending.

In some of these cases, stays of execution pending appeal were granted by the district courts; in a great many cases, stays were granted by the courts of appeals.

Prior to this case, the Fifth Circuit had granted such stays in at least eleven cases[10/] and denied stays in only two instances: a successive habeas corpus proceeding in Spenkelink v. Wainwright, No. 79-8211 (May 22, 1979),[11/] and the case

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10/ See Appendix D to this brief.

11/ Spenkelink's subsequent stay application to this Court was denied by Justices Rehnquist and Stevens, granted by Justice Marshall, and denied by the full Court. 442 U.S. 901, 1301, 1308 (1979).

[footnote 11/ continues on next page]

1982, rehearing denied, Dec. 6, 1982), stay and cert. denied, ___ U.S. ___, 51 U.S.L.W. 3469 (Dec. 6, 1982). Every other court of appeals faced with a stay application since 1976 has granted the stay.[12/] Most of the orders granting stays contain no detailed discussion of the appropriate standard to be applied, deciding simply that -- in view of the irreparability of the harm facing the appellant if a stay were not granted -- the appropriateness of a stay was obvious. As the Eleventh Circuit observed in Dobbert v. Strickland, 670 F.2d 938, 940 (11th Cir. 1982):

> Unless the execution of sentence is stayed in this case, the issues on

---

11/ continued

See also Spenkelink v. Wainwright, No. 79-8215 (5th Cir. May 24, 1979)(vacating stay granted by a Circuit Judge on original habeas corpus), stay denied, 442 U.S. 906 (1979).

12/ See Appendix D to this brief.

> appeal would become moot, and the defendant would never have his day in this court on Constitutional issues. Because the brief period of time between the filing of this appeal and the scheduled execution is insufficient to consider properly the merits of the issues raised, this Court must stay the execution of the death sentence. Where the merits cannot be satisfactorily considered prior to execution of a scheduled death sentence, as in this instance, a stay should be granted.

Where the standard has been discussed, the inquiry most often has begun and ended with the observation that the appellant's claims could not be deemed frivolous. See, e.g., Hance v. Zant, No. 82-8342 (11th Cir. June 9, 1982)(not "patently frivolous"); Goode v. Wainwright, 670 F.2d 941, 942 (11th Cir. 1982)("not frivolous;" "non-frivolous issues that are not foreclosed by the state court processes"). As the Fourth Circuit noted in Shaw v. Martin, 613 F.2d 487, 492 (4th Cir. 1980)(Phillips, J.):

> [I]t may be appropriate to require a facial showing of substance to justify a stay [citation omitted]. But ... the inquiry into substance prop-

> erly stops with identification of the nature of the issue, and with consideration as to whether it has been already fairly litigated on the merits under procedures designed for the purpose. In the very nature of proceedings on a motion for a stay of execution, the limited record coupled with the time constraints imposed by imminence of execution preclude any fine-tuned inquiry into the actual merits.

The principle underlying this approach was perhaps best summarized by Chief Judge Godbold of the Eleventh Circuit in Goode v. Wainwright, supra, 670 F.2d at 941 (emphasis in original):

> Under the laws of our country petitioner is given the right to seek review in the federal courts of claims based upon our national Constitution and arising from his State court conviction. If he is denied relief in the federal district court then the law gives him the right to appeal.
>
> There are sharply differing views over whether our law ought to provide that one convicted of crime in State court may obtain a second "collateral" review in federal courts of constitutional issues arising from his conviction. But the law of our country does provide for it, and federal court judges take an oath to carry out that law.

This consistent approach of all courts of appeals (including, until recently, the Fifth Circuit) to stay applications in death cases adheres to this Court's reiterated concern that condemned prisoners not be put to death without full consideration of the constitutionality of the proceedings which have brought them to the brink of execution. See, e.g., Lenhard v. Wolff, 443 U.S. 1306 (1979)(Rehnquist, Circuit Justice); Evans v. Bennett, 440 U.S. 1301, 1306 (1979) (Rehnquist, Circuit Justice) (noting the "obviously irreversible nature of the death penalty"); Gregg v. Georgia, 429 U.S. 1301 (1976)(Powell, Circuit Justice)("If the executions in these cases were carried out before the petition for rehearing could be acted on by the Court, the harm to petitioners obviously would be irreparable. In addition, the cases would then be moot. Nor is there any reason to believe that the granting of a stay ...

will prejudice the interests of the respondent states"); Maxwell v. Bishop, 385 U.S. 650 (1967), subsequent history in 398 U.S. 262 (1970); Burwell v. Teets, 350 U.S. 808 (1955); cf. Williams v. Georgia, 349 U.S. 375, 390-91 (1955).

Nonetheless, the Fifth Circuit has held in this case that it will treat stay applications in death cases no differently than stay applications in civil litigation. Relying upon two stay opinions in a prisoners' rights class action which has dragged on for more than decade and which obviously would not have become moot regardless of the disposition of the stay applications,[13/] the court of appeals below required petitioner Barefoot to establish a "likelihood of success on the merits" and "a substantial case on the merits of ... [a] serious legal question."

13/ Ruiz v. Estelle, 666 F.2d 854, 857 (5th Cir. 1982); Ruiz v. Estelle, 650 F.2d 555 (5th Cir. 1981).

Slip op. at 3. We have demonstrated above that this novel approach to stay applications in death cases is entirely out of line with the approach of all other Circuits and of this Court. We shall next examine whether it has any place in a civilized and sensibly administered system of justice.

B. The Fifth Circuit's New Approach To Stay Applications Presents A Distinct Risk That Some Death-Sentenced Prisoners Whose Habeas Corpus Appeals On The Merits Would Have Succeeded Will Nonetheless Be Executed, And Places Unnecessary Burdens Upon The Courts of Appeals and Upon This Court, Even Though The States Suffer No Irreparable Harm In Allowing Such Appeals To Be Heard On The Merits

In considering whether there is any justification for the Fifth Circuit's approach in this case to the processing of stay applications, it is instructive to examine from past experience how many capital federal habeas corpus appeals are likely to be meritorious. Since 1976 the federal courts of appeals nationally

have decided 41 capital cases on the merits.[14] According to our records, 30 (73.2%) of these have been decided in favor of the death-sentenced individual. In the Fifth Circuit, 27 capital cases have been decided on the merits during this period. Of the 27, 21 (77.7%) have been decided in favor of the death-sentenced individual. Even looking solely at cases in which the death-sentenced habeas corpus petitioner was the appellant, the ratio of rulings in the petitioner's favor has been extremely high: of 21 such capital appeals decided by the Fifth Circuit since 1976, 15 (71.4%) were decided favorably to the death-sentenced individual (although one was later reversed by this Court and another is presently pending on a grant of certiorari).[15] Additionally, the cases

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14/ A list of the 41 cases appears as Appendix E to this brief.

15/ See Appendix E, cases numbered 2-4, 6-8, 11-13, 16, 18, 20 and 24-26.

in which a petitioner-appellant was denied relief were difficult cases. One has been subsequently questioned by the Eleventh Circuit in the light of a more recent decision of this Court;[16/] in another, the petitioner was granted a stay and plenary review on a successive federal habeas proceeding raising significant issues mishandled by prior habeas counsel;[17/] and a third, initially affirmed by a panel only two days after oral argument, became the subject of an en banc proceeding in which the Fifth Circuit divided by a 6-5 vote.[18/]

16/ See Proffitt v. Wainwright, 685 F.2d 1227, 1261-62 n.52 (11th Cir. 1982), holding that Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), was overruled in part by Godfrey v. Georgia, 446 U.S. 420 (1980).

17/ Baldwin v. Maggio, No. 82-3318 (5th Cir., stay granted May 24, 1982; argued August 19, 1982); for prior proceedings see Baldwin v. Blackburn, 653 F.2d 942 (5th Cir. 1981).

18/ Williams v. Maggio, 679 F.2d 381 (5th Cir. 1982) (en banc), reviewing the panel decision in Williams v. Blackburn, 649 F.2d 1019 (5th Cir. 1981).

This record raises serious doubt whether there is any justification at all for the Fifth Circuit to be scrutinizing the merits of constitutional issues presented in haste and under pressure on stay applications, as was done in petitioner's case, prior to briefing, oral argument, and deliberate consideration of the whole appeal. An extraordinary proportion of capital federal habeas corpus appeals do have merit, even though they present claims that have been unsuccessful in the state courts, on certiorari, and in the federal district courts prior to reaching the court of appeals. Accordingly, the sort of rushed procedure which took place in the present case, apparently designed to weed out an occasional meritless appeal, seems largely unnecessary and entirely counter-productive. This is particularly so since the States suffer no irreparable harm if an occasional meritless appeal

lasts four or six months instead of being cut short on a stay application after four or six weeks. On the other hand, the harm to the appellant who is executed is obviously both of enormous magnitude and irreparable, especially if he or she happens to be one of the large proportion -- 71.4% to date in the Fifth Circuit -- who prevail when accorded the measured and deliberate reflection which a full appeal on the merits provides.

Some may doubt whether any death-sentenced person with a potentially meritorious case could fail to persuade any panel of federal appellate judges to grant a stay under the "substantial case" standard employed by the court of appeals below. We believe, however, that the risk is very great, considering the rushed nature of the proceedings in which stay applications are determined. As the number of capital cases to reach the federal appellate level has

grown, the ability of experienced organizations such as the NAACP Legal Defense Fund to monitor such cases effectively has diminished rapidly. Today, a disturbingly large number of death row prisoners are not represented on federal habeas corpus by attorneys with specialized competence in capital litigation. Indeed, many are now represented by criminal law practitioners with minimal past exposure to constitutional law, appellate practice and the federal courts. These attorneys are often solo practitioners with limited resources and facilities. They are simply incapable of turning out extensive stay applications on complex constitutional issues overnight. Frequently they do not even have the xerox facilities needed to reproduce the extensive documentation of prior proceedings which ideally should accompany stay applications. In the near future, this situation is bound to worsen. Demonstrating the

potential merit of a potentially meritorious appeal is no simple matter for an inexperienced lone practitioner, trying to meet the obligations of a paying practice while devoting such volunteer time as can be mustered, with limited facilities and support staff, to the frantic preparation of stay papers in an effort to save the client's life.

The rushed nature of proceedings on stay applications can cause even more experienced practitioners to overlook factual or legal authority which might save the life of a death-sentenced prisoner. For example in Brooks v. Estelle, No. 82-1613 (5th Cir. No. 26, 1982, reconsideration denied, Dec. 6, 1982), counsel overlooked an important Fifth Circuit precedent in support of one of the petitioner's principal arguments on his motion for a stay in the court of appeals -- the claim that the granting of a certificate of

probable cause by the district court required the Fifth Circuit to hear his appeal on the merits rather than rendering it moot by denying a stay. Reliance was placed primarily upon a decision of the Ninth Circuit, Fouquette v. Bernard, 198 F.2d 96, 98 (9th Cir. 1952) (Denman, C.J.), which of course was not binding upon the Fifth, holding that "[o]bviously, if there is probable cause for the appeal it would be a mockery of federal justice to execute ... [the petitioner] pending its consideration." But subsequent to Mr. Brooks' execution, amicus has discovered a Fifth Circuit case which cited Fouquette with approval for the same proposition. United States ex rel. Goins v. Sigler, 250 F.2d 128, 129 (5th Cir. 1957).[19/] Since

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19/ Goins cites the decision of yet another Circuit which has embraced Fouquette. United States ex rel. DeVita v. McCorkle, 214 F.2d 823 (3rd Cir. 1954).

For a full history of the Goins case, documenting a 13 year struggle which culminated in the granting of habeas corpus relief, see Goins v. Allgood, 391 F.2d 692 (5th Cir. 1968).

the Fifth Circuit strictly adheres to the rule that only the en banc court may overrule the prior decision of a panel,[20/] a citation to Goins in Mr. Brooks' Fifth Circuit papers should have caused the Brooks panel to stay his execution. Yet in the last-minute flurry of activity in Brooks, there was inadequate time to uncover the crucial Goins precedent.

Inevitably, as the number of persons on death row across the nation rises, and as the number of capital federal habeas corpus appeals rises, mistakes of this sort are bound to occur if every stay application becomes a frenzied "mini-appeal" in which the court of appeals convenes in haste to judge in haste whether each

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20/ See, e.g., Ruiz v. Estelle, supra, 666 F.2d at 857 n.5 and cases cited therein (5th Cir. 1982) (per Rubin, J., Presiding Judge of the Brooks panel) ("'we cannot disregard the precedent set by a prior panel, even though we perceive error in the precedent'"); United States v. Rodriguez, 585 F.2d 1234, 1247-48 (5th Cir. 1978) (per Rubin, J.) (even dictum of prior panels should be adhered to).

petitioner's hastily drawn stay papers demonstrate a likelihood of success on the merits. There are now 1,147 person under sentence of death nationally, 221 of them in the Fifth Circuit.[21/] Approximately 60 cases have already reached the federal courts of appeals, and roughly 100 more are pending in the federal district courts. As more and more individuals are sentenced to death, more and more cases will move into the federal courts and ultimately to the courts of appeals. If the approach of the Fifth Circuit to this case is embraced by this Court, every federal habeas appeal will become an occasion for the courts of appeals -- and ultimately this Court as well -- to interrupt their regular business and dislocate their regular schedules in order to conduct a harried inquiry into whether or not the appeal is likely to succeed.

21/ NAACP Legal Defense Fund, Death Row: USA (Feb. 20, 1983).

We respectfully submit that this is no way to handle cases in which the stakes are higher than in any other litigation. "[T]he action of the sovereign in taking the life of one of its citizens ... differs dramatically from any other legitimate state action." Gardner v. Florida, 430 U.S. 349, 358 (1977)(plurality opinion). Fairness, and the appearance of fairness (ibid.), must at all times govern the consideration of applications for stays of execution. Yet the approach adopted by the Fifth Circuit in this case promotes the very opposite. If this had been any non-death case, civil or criminal, petitioner would have had the opportunity for full briefing on the merits, and the court of appeals would have had more than a day to study the voluminous record[22/] and to study

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22/ Notably, the court of appeals rejected one of petitioner's contentions — a claim that the prosecution had knowingly presented perjured eyewitnesses testimony at trial — on the ground that the testi-

[footnote 22/ continues on next page]

the impressive body of case law and psychiatric authority relevant to his appeal. It is senseless to accord him any less because his life is at stake.

Other concerns underscore the improvident nature of the stay procedure employed by the Fifth Circuit in petitioner's case, by which a preliminary screening of merit comes to be converted into an appeal-before-the-appeal. The time of circuit judges which is diverted from their conduct of their regular appellate business, and the disruption of the orderly procedures through which that business is necessarily carried on, are drains upon the federal judiciary that can only hamper its ability

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22/ continued

mony in question "could not affect the determination of Barefoot's guilt," slip op. at 14, in view of the strength of the prosecution's other evidence. This conclusion required thorough familiarity with the entire 1400 page trial record, which the court of appeals possessed for exactly 24 hours before delivering its 16-page opinion.

to do all of its important work well. The burdens that are imposed upon this Court when a stay is denied -- or, indeed, when a stay is granted under standards that implicate a decision on the merits and hence invite the State to seek its review here[23/] -- are a further drain upon the country's single most limited and precious judicial resource. The pressure-cooker atmosphere that inescapably builds up around these frenetic eleventh-hour proceedings is altogether inconsistent with the tone of measured deliberation that should mark the due administration of justice in the federal courts, particularly in matters of the gravest moment.

But, without denigrating these concerns in the slightest, we do not believe that they go to the heart of the matter.

23/ See, e.g., O'Bryan v. Estelle, 691 F.2d 706 (1982), motion to vacate denied, ___ U.S. ___, No. A-396 (Oct. 29, 1982).

Far more basic is the question how a court system which acknowledges that "the imposition of death by public authority is so profoundly different from all other penalties" because of, inter alia, the "nonavailability of corrective or modifying mechanisms with respect to an executed capital sentence," Lockett v. Ohio, 438 U.S. 586, 605 (1978) (plurality opinion), can fairly or rationally give death-sentenced appellants only a drastically abbreviated version of the ordinary processes vouchsafed to all other litigants for review of their contentions on appeal. Why should the circumstance that the State -- the opposing litigant -- has unilaterally chosen to set an execution date which deprives a federal appellate court of the time necessary for its usual measure of deliberate reflection be permitted to harry it into giving the most truncated consideration to the cases with the most

momentous consequences?

If the State had any substantial countervailing interests at stake, perhaps the question would be a closer one. But given the large numbers of cases nearing the end of the federal habeas corpus process, it is readily apparent that the States' interest in having some executions take place will necessarily be satisfied in the near future in any event. Executions, so rare in recent years, are obviously likely to become more frequent occurrences in the future. It matters little to the States whether, in any given case, a condemned individual is allowed to remain alive long enough for one full federal habeas corpus proceeding including an appeal.

Second and successive federal habeas corpus petitions present a different issue. To the extent that these involve the danger that a condemned inmate might attempt to

use repeated petitions and appeals as a mere delaying tactic, the State has a quite legitimate interest in preventing such abuses of the writ. Rule 9 of the Rules Governing Section 2254 Cases in the United States District Courts amply protects that interest; and when a repeater petition has been dismissed under Rule 9, a more restrictive standard may appropriately be employed in assessing whether the petitioner should be granted a stay pending appeal. But a first federal habeas corpus petition -- such as the one now before this Court -- is nothing more or less than the process necessary to assure that a death-sentenced inmate has his or her properly preserved federal constitutional claims determined once on the merits by the federal judiciary, pursuant to 28 U.S.C. §§ 2241(c)(3) and 2254. Whatever harm the State encounters by postponement of an execution to permit that process

to take place is by no means irreparable.

Yet the truism bears repeating that the injury suffered by the death-sentenced individual whose appeal is cut short is irreparable. See, e.g., Coleman v. Balkcom, 451 U.S. 949, 953 (1981) (opinion of Justice Stevens). As we have noted earlier, see pp. 26-28 supra, a remarkable number of habeas corpus appeals in death cases do have merit. Under the approach taken by the court of appeals in this case, it is virtually inevitable that at least some individuals whose lives would have been spared by a full appeal on the merits will be executed without ever being accorded such an appeal. That price is simply too great for a civilized nation to pay.

C. The Appropriate Standard For The Granting Of A Stay Of Execution In A Death Case Should Be A Determination That The Death-Sentenced Prisoner's Claims Are Not Legally Frivolous

We believe that the correct standard for evaluation of a first-time federal

habeas appellant's application for a stay of execution is whether his or her appeal presents any non-frivolous constitutional issue. This standard, which has been applied with consistency in recent Eleventh Circuit cases, see Hance v. Zant, supra, (issues which are not "patently frivolous"); Goode v. Wainwright, supra, 670 F.2d at 942 ("non-frivolous" issues), minimizes the risk that stays will be denied to appellants who might ultimately prevail on the merits, and also minimizes the amount of time that judges are required to spend evaluating stay applications, while preserving a check -- if a check is deemed necessary -- against the delay of an execution by a truly meritless appeal. We also think that a "legally frivolous" standard provides the clearest possible guideline for judicial action, particularly under the conditions of haste that typically attend consideration of stay applica-

tions, and is thus least likely to be misapplied in practice, whether by granting or denying stays erroneously.

A "legally frivolous" issue is one which is either (a) clearly foreclosed by a squarely controlling[24/] recent holding[25/] of this Court,[26/] or (b) lacking

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24/ A claim cannot be deemed legally frivolous by extrapolation of the language of a prior opinion to resolve issues not presented in the earlier case. Thus, the Court's refusal to find Ga. Code Ann. § 27-2534.1(b)(7) facially unconstitutional on grounds of either overbreadth or vagueness in Gregg v. Georgia, 428 U.S. 153, 201, 202 n.54 (1976), did not render frivolous a subsequent contention that the same statutory section was overbroad or vague in its application to the facts of another case. See Godfrey v. Georgia, 446 U.S. 420 (1980).

25/ A claim cannot be deemed legally frivolous on the basis of decisions that are arguably called into question by subsequent developments, even though the older decisions have not yet been reexamined by this Court. Thus, the claim vindicated in Gardner v. Florida, 430 U.S. 349 (1977), was not frivolous in 1976 despite Williams v. New York, 337 U.S. 241 (1949); nor was the claim vindicated in Bullington v. Missouri, 451 U.S. 430 (1981), frivolous in 1980 despite Stroud v. United States, 251 U.S. 15 (1919).

26/ A claim cannot be deemed legally frivolous on the basis of a previous decision by the court of appeals which has gone unreviewed by this Court. Such decisions remain subject to repudiation either by this Court or -- in the event of intervening decisions of this Court -- by the court of appeals itself. See note 16 supra.

any factual basis whatsoever in the record of the case. For example, a death-sentenced appellant advancing an ex post facto argument identical to the one rejected in Dobbert v. Florida, 432 U.S. 282 (1977), would have a legally frivolous claim, as would a death-sentenced appellant who claims a violation of Witherspoon v. Illinois, 391 U.S. 510 (1968), when the record shows with indisputable clarity that the prospective jurors at issue were excused for reasons other than their attitudes toward the death penalty. This standard would allow the courts of appeals to weed out those rare capital habeas corpus appeals which have no basis in law or fact, without putting every condemned prisoner, his or her attorney and the courts through a breakneck, high-pressure "mini-appeal" in which mistakes can -- and over the course of time inevitably will -- be made.

We recognize that such a standard is roughly equivalent to that for dismissal of an appeal. See Fifth Circuit Local Rule 20, permitting dismissal of appeals that are "frivolous and entirely without merit." But that is as it should be. To execute a death-sentenced individual while his appeal is pending is certainly the functional equivalent of dismissing his appeal. Yet the panel which hastily reviewed petitioner's case consigned him to die without according him any more process than a dismissal would, and without holding the State to the showing of frivolity required for a dismissal. We respectfully submit that a condemned man or woman facing imminent execution is entitled to something more.

Because of the unique difference between execution and all other criminal sanctions, this Court

> has gone to extraordinary measures to ensure that the prisoner sen-

> tenced to be executed is afforded process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice or mistake.

Eddings v. Oklahoma, 455 U.S. 104, 118 (1982)(concurring opinion of Justice O'Connor). Its insistence upon such "extraordinary measures" applies both to the determination that the defendant is guilty and to the determination that he deserves to die. Beck v. Alabama, 447 U.S. 625, 637-38 (1980); Lockett v. Ohio, 438 U.S. 586, 604 (1978)(plurality opinion); Gardner v. Florida, supra, 430 U.S. at 357-58 (1977)(plurality opinion); id. at 363-64 (concurring opinion of Justice White); Woodson v. North Carolina, 428 U.S. 280, 305 (plurality opinion). The decision below, denying Thomas A. Barefoot a stay of execution to permit one full opportunity for federal habeas corpus review of constitutional claims which manifestly are not legally frivolous, plainly violated these principles.

II

THE INTRODUCTION OF THE "HYPOTHETICAL" TESTIMONY OF DOCTORS GRIGSON AND HOLBROOK SEVERELY UNDERMINED THE RELIABILITY OF THE FACTFINDING PROCESS AT PETITIONER'S PENALTY TRIAL, IN VIOLATION OF HIS RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS 27/

At the outset, it is relevant to note the context in which the "hypothetical" testimony of Doctors Grigson and Holbrook was offered. Between 1974 and 1977, Texas prosecutors introduced psychiatric testimony at the penalty phase of numerous capital trials. This testimony was commonly derived from pretrial psychiatric examinations at which the defendant had

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27/ The Fifth Circuit's failure to grant a stay of execution is, in and of itself, a sufficient ground for reversal of its January 20 order. One appropriate disposition would therefore be simply to remand this case to the court of appeals with instructions that it enter a stay of execution and consider the appeal in the ordinary course of business. Cf. Maxwell v. Bishop, supra; Burwell v. Teets, supra. However, since this Court has directed the parties to brief not only the question of the stay but also "the issues on the appeal before the United States Court of Appeals for the Fifth Circuit," 51 U.S.L.W. 3563 (Jan. 24, 1983), and since the above-titled issue is of particular concern to amicus, we will discuss it briefly in the pages that follow.

not been warned that anything he said might be used to seek his execution. However, eleven months prior to petitioner's trial, this practice was declared in violation of a capital defendant's Fifth Amendment rights in Smith v. Estelle, 445 F.Supp. 647 (N.D. Tex. 1977). In Thomas Barefoot's case the prosecutor, fearing that Smith might be affirmed on appeal,[28] concededly sought to circumvent the impact of Smith by using "hypothetical" testimony without actual psychiatric examinations -- a strategy he described at the federal habeas corpus hearing below as "pretty brilliant." T. 254.[29] To accomplish this end, the prosecutor relied upon two Texas psychiatrists, James P. Grigson and John T. Holbrook, who had testified for the State on the basis of pretrial examinations in the overwhelming majority of pre-Smith

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28/ It was. Smith v. Estelle, 602 F.2d 694 (5th Cir. 1979), aff'd sub. nom. Estelle v. Smith, 451 U.S. 454 (1981).

29/ The practice of using "hypothetical" psychia-

[footnote 29/ continues on next page]

cases.[30]

The problem with this sort of psychiatric testimony is that it has absolutely no scientific basis. Since the American Psychiatric Association is also appearing as amicus curiae in this case, we will not burden the Court with repetition of the numerous reports of that organization or with citation of the many studies upon which those reports are based, documenting the utter unreliability of "hypothetical" psychiatric predictions of future dangerous-

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29/ continued

tric testimony at the penalty phase has surfaced in two other cases known to amicus. In both, the psychiatrist had examined the defendant and the jury had been told of the examination, but the prosecution nonetheless sought as best it could to cast the testimony primarily in hypothetical terms. In one of these cases federal habeas corpus relief has been granted as a result of the psychiatric testimony. White v. Estelle, ___ F. Supp. ___, Civil Action No. H-81-1661 (S.D. Tex. Dec. 30, 1982); in the other, Vanderbilt v. State, 629 S.W.2d 709 (Tex. Crim. App. 1981), a federal habeas corpus proceeding is pending.

30/ A summary of those appearances of Doctors Grigson and Holbrook in Texas capital cases which are known to amicus is set forth in Appendix B to this brief.

ness. Even in cases where the psychiatrist-witness has actually examined the defendant, the psychiatric community believes that prognosticating violent criminal acts in the indeterminate future stands, "generously analyzed -- at the fringes of professional responsibility" and brings the doctor to "the brink of quackery." Dix, The Death Penalty, "Dangerousness," Psychiatric Testimony, and Professional Ethics, 5 Am. J. Crim. L. 151, 172 (1977). Where the psychiatrist has not examined the defendant, the profession's condemnation is unreserved.[31/]

This Court has held that

31/ Neither of petitioner's expert witnesses at the hearing in the district court voiced anything but condemnation of the testimony of Doctors Grigson and Holbrook. The suggestions to the contrary in the opinions below are clearly unsupported by the record; indeed, they are contradicted by it. See Appendix C infra. Neither Dr. Fason nor Dr. Dickerson agreed that a bona fide medical diagnosis of sociopathy could be made of petitioner based upon a hypothetical question, and neither Dr. Fason nor Dr. Dickerson concurred in the view that medical experts are capable of predicting long-term future dangerousness.

> [T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. ... Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

Woodson v. North Carolina, 428 U.S. 280, 305 (1976). The point has been repeated by the Court time and time again, and stands as the single most prevalent theme in its post-1976 decisions in death cases.[32/]

There is no constitutional novelty to the proposition that some evidence is so inherently unreliable that it should not be allowed to be submitted to a jury. Indeed, that was the very basis of this be allowed to be submitted to a jury. Indeed, that was the very basis of this Court's earliest decisions forbidding the

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32/ Gardner v. Florida, 430 U.S. 349, 359 (1977) (plurality opinion); id. at 363-64 (concurring opinion of Justice White); Lockett v. Ohio, 438 U.S. 586, 604 (1978)(plurality opinion); Green v. Georgia, 442 U.S. 95, 97 (1979); Beck v. Alabama, 447 U.S. 625, 637-38 & n. 13 (1980); Eddings v. Oklahoma, 455 U.S. 104, 110-12 (1982); id. at 118-19 (concurring opinion of Justice O'Connor).

use of involuntary confessions. In Brown v. Mississippi, 297 U.S. 278 (1936), the question before the Court was whether, in addition to the state-law principle that coercion might be shown to affect the jury's consideration of the weight of a confession (id. at 279), there should be a federal constitutional rule forbidding admission of a coerced confession into evidence. The Court adopted such a rule, in an opinion bespeaking a strong concern that the unreliability of the confession so outweighed its meager probative value that it would offend due process to allow it to be heard by the jury. Prior to the incorporation of the Fifth Amendment into the Fourteenth in Malloy v. Hogan, 378 U.S. 1 (1964), this concern appeared as the basis for decisions of the Court in other confession cases such as Blackburn v. Alabama, 361 U.S. 199, 207 (1960) ("this judgment can without difficulty be articulated in terms of the unreliability of the confes-

sion"). The principle was perhaps best expressed in Stein v. New York, 346 U.S. 156, 192 (1952):

> [R]eliance on a coerced confession vitiates a conviction because such a confession combines the persuasiveness of apparent conclusiveness with what judicial experience shows to be illusory and deceptive evidence.

And although incorporation of the Fifth Amendment brought new policy considerations into play which eventually overshadowed unreliability as the principal basis for suppression, the unreliability rationale remains a vital force that has not been lost upon members of this Court in modern times. See Brewer v. Williams, 430 U.S. 387, 423 (1977) (dissenting opinion of the Chief Justice)("[i]nvoluntary and coerced admissions are suppressed because of ... inherent unreliability"); Stone v. Powell, 428 U.S. 465, 496-97 (1976) (concurring opinion of the Chief Justice); Schneckloth v. Bustamonte, 412 U.S. 218, 242 (1973); Kaufman v. United States, 394 U.S. 217, 237 (1969) (dissenting opinion of Justice

Black); Linkletter v. Walker, 381 U.S. 618, 638 (1965).

Again, in the case of suggestive lineups and other identification procedures, this Court has determined that certain evidence is so unreliable yet prejudicial that due process does not permit the jury to even be told of it. Foster v. California, 394 U.S. 440 (1969); Stovall v. Denno, 388 U.S. 293, 301-02 (1967), approving Palmer v. Peyton, 359 F.2d 199 (4th Cir. 1966)(en banc). "It is the reliability of identification evidence that primarily determines its admissibility." Watkins v. Sowders, 449 U.S. 341, 347 (1981). See also Doyle v. Ohio, 426 U.S. 610, 617 (1976).

Perhaps in non-death cases it might seem overintrusive for this Court to classify unreliable testimony adduced through medical quackery together with unreliable eyewitness identifications and unreliable admissions of guilt by the defendant. Where human life was not at

stake, perhaps we could rest assured that cross-examination and rebuttal testimony would suffice to persuade the jury that the doctor's testimony is as specious and deceptive as it is in fact.[33/] But in death cases "members of the jury will have had little, if any, previous experience in sentencing, ... [and] are unlikely to be skilled in dealing with the information they are given." Gregg v. Georgia, 428 U.S. 153, 192 (1976)(plurality opinion). To allow an "expert" to testify at the penalty phase of a capital case, expressing a totally baseless opinion which addresses the very statutory question that the jury must answer in determining whether a human being will live or die, is so fraught with

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33/ We note, however, that in routine criminal cases the courts have almost universally barred evidence derived from lie detector tests, albeit upon non-constitutional grounds, precisely because such evidence is so inherently prejudical yet scientifically unreliable. See, e.g., People v. Leone, 25 N.Y.2d 511, 255 N.E.2d 696, 307 N.Y.S.2d 430 (1969), and cases cited therein; Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

the danger of delusion as to undermine the degree of reliability which this Court has insisted upon in capital sentencing as a requirement of the Eighth and Fourteenth Amendments.[34/] As the Supreme Court of California has held, such testimony simply has no place in a fair and rational death sentencing system. People v. Murtishaw, 175 Cal. Rptr. 738, 631 P.2d 446 (1981).[35/]

The court below was plainly wrong in believing that this Court's decisions in Jurek v. Texas, 428 U.S. 262 (1976), and Estelle v. Smith, 451 U.S. 454 (1981), impliedly approved the use of hypothetical predictions of long-term future dangerousness when offered at Texas capital trials by psychiatrists who had never examined the defendant. Neither case, of course,

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34/ Cf. Bullington v. Missouri, 451 U.S. 430, 446 (1981)("in a capital sentencing proceeding it is the State, not the defendant, that should bear 'almost the entire risk of error'").

35/ See also Gholson v. Estelle, Civil Action

[footnote 35/ continues on next page]

involved any question of the sort. In Jurek the Court merely noted that the criminal justice system frequently makes assessments of dangerousness, and expressed no view as to what kind of evidence should or should not be considered in arriving at those assessments. 428 U.S. at 275-76. In Smith the Court interpreted Jurek as not necessarily "disapproving the use of psychiatric testimony bearing on the issue of future dangerousness," 451 U.S. at 473, but neither did the Court endorse the use of such testimony under all circumstances.[36/]

35/ continued

No. W-78-CA-68, slip op. at 6 (W.D. Tex. Oct. 31, 1979)("Although not necessary to the disposition of the matter before it, the Court wishes to express its reservations about the validity of the conclusions reached by Drs. Holbrook and Grigson, as well as the relevancy of their testimony in deciding the special verdict questions under [Tex. Code. Crim. Pro.] Article 37.071"), aff'd on other grounds, 675 F.2d 734 (5th Cir. 1982).

36/ The Court said only that its "holding based on the Fifth and Sixth Amendments will not prevent the State in capital cases from proving the defendant's future dangerousness as required by statute.

[footnote 36/ continues on next page]

The Court took note of the strong concerns expressed by the American Psychiatric Association, 451 U.S. at 472, stated that "the inquiry mandated by Texas law does not require resort to medical experts" (id. at 473), and expressed no dissatisfaction with the notion that the State of Texas might have to "make its case on future dangerousness some other way" (id. at 469). This Court is well aware that "[g]iven the lack of certainty and the fallibility of psychiatric diagnosis," there is a "serious question" as to whether such expert testimony can ever establish future dangerousness beyond a reasonable doubt. Addington

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36/ continued

A defendant may request or consent to a psychiatric examination concerning future dangerousness in the hope of escaping the death penalty. In addition, a different situation arises where a defendant intends to introduce psychiatric evidence at the penalty phase." 451 U.S. at 472. Both of these careful reservations regarding the scope of the Fifth and Sixth Amendment prohibitions announced in Smith appear to contemplate a psychiatric examination of the defendant. Neither can conceivably be read as approving the admissibility of hypothetical psychiatric opinions of future dangerousness over Eighth Amendment objection.

v. Texas, 441 U.S. 418, 429 (1979). Apparently, the reasoning by which the Fifth Circuit concluded that Jurek and Smith had spoken to the issue presented in the instant case was that by approving a lay jury's decision regarding future dangerousness as the basis for a death sentence, the Court had necessarily committed itself to acceptance of the admissibility of testimony to the same conclusion "by a mental health professional, trained to detect mental illness and personality types." Slip op. at 10. But this is a complete non sequitur. For the Eighth Amendment vice of admitting hypothetical psychiatric testimony conjecturing at future dangerousness is precisely that it does appear to come from a trained mental health professional, and so is fatally misleading in view of its total scientific groundlessness. As the District Court for the Southern District of Texas perceptively

noted in White v. Estelle, ___ F.Supp. ___, Civil Action No. H-81-1661, slip op. at 17 (S.D. Tex. Dec. 30, 1982), such hypothetical speculation without examination of the defendant "is not a professional, but a lay opinion [footnote omitted]. However, when this lay opinion is proferred by a witness bearing the title 'Doctor,' its impact on the jury is much greater that if it were not masquerading as something it is not." The masquerade is what creates the unreliability, calling the Eighth Amendment into play.

Given "the gravity of the decision to be made at the penalty phase" of Texas capital cases, Estelle v. Smith, supra, 451 U.S. at 463, it would make a mockery of capital sentencing to turn every case into a battle of experts in which the prosecution first presents a psychiatrist such as Dr. Grigson to testify "hypothetically," and defense counsel then cross-examines with volumes of psychiatric literature, calls

representatives of the American Psychiatric Association as rebuttal witnesses, or both. Yet, given the persistence of Dr. Grigson and of Texas prosecutors (such as the one who tried petitioner's case) who believe that it is a "brilliant" idea (T. 254) to utilize his services in this fashion, that would be the inevitable result of an affirmance here. Surely, this Court did not, in upholding the Texas capital sentencing system in Jurek, intend to produce such a farce. The Court can and should consequently hold that the testimony of Doctors Grigson and Holbrook at petitioner's trial was so inherently unreliable as to be inadmissible in a capital case under the Eighth and Fourteenth Amendments.

CONCLUSION

This Court should reverse the judgment of the Fifth Circuit and order the granting of habeas corpus relief to the extent of vacating petitioner's death sentence. In

the alternative, should the Court decline to resolve the merits of petitioner's constitutional claims, the Court should remand the case to the Fifth Circuit with instructions to enter a stay of execution and to hear petitioner's appeal.

Respectfully submitted,

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APPENDIX A

TESTIMONY OF DOCTORS HOLBROOK AND GRIGSON AT THE PENALTY PHASE OF PETITIONER'S TRIAL

Neither Doctor Holbrook nor Doctor Grigson had examined petitioner. SF 2014, 2063, 2073, 2101, 2110, 2132. Nevertheless, both were allowed to offer expert testimony, over petitioner's repeated objection (SF 2042-44, 2065-66, 2091, 2126, 2130-31), in which they diagnosed petitioner and predicted his future commission of violent criminal acts solely upon the basis of a lengthy "hypothetical" question which encompassed virtually every shred of testimony adduced by the prosecution at the guilt and penalty trials (SF 2016-31, 2073-91, 2111-26).

In this manner, Doctor Holbrook diagnosed Thomas Barefoot, "within a reasonable psychiatry [sic] certainty," as a "criminal sociopath." SF 2097. He testified that he knew of no treatment that could change this condition, and that the

condition would not change for the better but "may become accelerated" in the next few years. SF 2100. Finally, Dr. Holbrook testified as follows:

> Q. [By the Prosecutor] If you would assume the facts that I have given you in the hypothetical as true, can you tell us whether or not you have an opinion within reasonable psychiatric certainty as to whether or not there is a probability that the Thomas A. Barefoot in that hypothetical will commit criminal acts of violence in the future that would constitute a continuing threat to society?
>
> * * *
>
> A. In my opinion he will.
>
> Q. Would that opinion change if we were talking about the society within the Texas Department of Corrections as opposed to the society of Bell County, Texas?
>
> A. It would not.

SF 2100-01.

Dr. Grigson testified, based solely upon the prosecutor's hypothetical question, that he could diagnose Thomas Barefoot "within reasonable psychiatric

certainty" as an individual with "a fairly classical, typical, sociopathic personality disorder." SF 2127-28. He placed petitioner in the "most severe category" of sociopaths, and stated that there was no known cure for this condition. SF 2129. Finally, Dr. Grigson testified to the following:

> Q. [By the Prosecutor] Assuming as true the facts of the hypothetical question which I have just recited to you, do you have an opinion within reasonable psychiatric certainty whether or not there is a probability that the defendant, Thomas Andrew Barefoot, will commit criminal acts of violence that would constitute a continuing threat to society?
>
> A. Yes, sir, I have an opinion to that.
>
> Q. What would that opinion be?
>
> A. Yes, he most certainly would.
>
> Q. Would you state whether or not that would be true regardless where he is?
>
> A. It wouldn't matter whether he was in the penitentiary or whether he

was free. Wherever he is he's going to continue what he's already been doing.

Q. Would you state whether or not, Doctor Grigson, you have an opinion within reasonable psychiatric certainty as to the degree of that probability that you have just expressed to this jury?

A. Well, yes, sir, I would put it at one hundred percent and absolute.

SF 2131.

On cross examination, Dr. Grigson conceded that he was not familiar with the American Psychiatric Association Task Force Report on Clinical Aspects of the Violent Individual and several other studies concerning the ability of psychiatrists to predict dangerousness. SF 2133-34. He then testified as follows:

Q. Are you aware, doctor, that it is the position of the American Psychiatric Association that psychiatrists cannot reliably predict whether or not someone -- criminals in the future are going to commit acts of violence?

A. No, that's not true. This is that same group that found homo-

sexuality was not an illness and this is a small minority group.

Q. I haven't identified the group, sir.

A. This is only a very small minority group. It's not the American Psychiatric Association that believes that.

SF 2134.

APPENDIX B

PRIOR APPEARANCES OF DOCTORS JAMES P. GRIGSON AND JOHN T. HOLBROOK AS WITNESSES FOR THE PROSECUTION IN TEXAS CAPITAL CASES

Amicus is aware of at least 23 capital cases in which Dr. Grigson has testified for the prosecution. His testimony is reported in Smith v. State, 540 S.W.2d 693 (Tex. Crim. App. 1976); Gholson v. State, 542 S.W.2d 395 (Tex. Crim. App. 1976); Livingston v. State, 542 S.W.2d 655 (Tex. Crim. App. 1976); Moore v. State, 542 S.W.2d 644 (Tex. Crim. App. 1976); Collins v. State, 548 S.W.2d 368 (Tex. Crim. App. 1976); Hughes v. State, 563 S.W.2d 581 (Tex. Crim. App. 1978); Chambers v. State, 568 S.W.2d 313 (Tex. Crim. App. 1978); Adams v. State, 577 S.W.2d 717 (Tex. Crim. App. 1978); Simmons v. State, 594 S.W.2d 760 (Tex. Crim. App. 1980); Rodriquez v. State, 597 S.W.2d 917 (Tex. Crim. App. 1980); Brandon v. State, 599 S.W.2d 567 (Tex. Crim. App. 1980); Holloway v. State, 613 S.W.2d 497 (Tex. Crim. App. 1981);

Hawkins v. State, 613 S.W.2d 720 (Tex. Crim. App. 1981); Thompson v. State, 621 S.W.2d 624 (Tex. Crim. App. 1981); and the instant Barefoot case. Our scrutiny of state trial records and postconviction pleadings reveals that he also testified for the prosecution in Boulware v. State, 542 S.W.2d 677 (Tex. Crim. App. 1976); White v. State, 543 S.W.2d 105 (Tex. Crim. App. 1976); Hovila v. State, 562 S.W.2d 243 (Tex. Crim. App. 1977); Jones v. State, 568 S.W.2d 847 (Tex. Crim. App. 1978); Ferguson v. State, 573 S.W.2d 516 (Tex. Crim. App. 1978); Armour v. State, 583 S.W.2d 349 (Tex. Crim. App. 1979); Wilder v. State, 583 S.W.2d 349 (Tex. Crim. App. 1979); and Burks v. State, 583 S.W.2d 389 (Tex. Crim. App. 1979).

In Chambers v. State, supra, Dr. Grigson testified that: "[m]y profession doesn't state that I've got to wait until

he kills twenty people before I can call him a sociopath." 568 S.W.2d at 326. When asked by defense counsel why another examination of the defendant was unnecessary, the doctor responded: "I don't need to see him again and put my life in jeopardy." Ibid. And the doctor described the defendant as a "'cancerous type person' who should be removed from society." Ibid. In Rodriguez v. State, supra, Dr. Grigson testified to alleged extraneous unadjudicated offenses of the defendant based solely upon the prosecutor's statements to him, when in fact the offense reports for those offenses (which the doctor had not bothered to read prior to his testimony) declared the charges to be "unfounded." 597 S.W.2d at 925 (Phillips, J. dissenting).

In Holloway v. State, supra, Dr. Grigson did not examine the defendant but rather testified solely on the basis of his conversations with police officers, jail

officials and other persons who knew the defendant, plus his review of the offense report and a medical information form filled out by the defendant upon admission to the county jail. The Texas Court of Criminal Appeals held this testimony inadmissible on state law grounds. 613 S.W.2d at 500-03.

Prior to his suicide in 1980, Dr. Holbrook testified for the prosecution in 13 capital cases of which we are aware. He appeared with Dr. Grigson in Gholson, Livingston, Moore, Hughes, Adams, Brandon, Boulware, White, Ferguson, and the instant Barefoot case. He also testified on his own in Ross v. State, 542 S.W.2d 395 (Tex. Crim. App. 1976); Granviel v. State, 552 S.W.2d 107 (Tex. Crim. App. 1976); and Muniz v. State, 573 S.W.2d 792 (Tex. Crim. App. 1978).

We are aware of a total of 39 Texas

capital cases in which psychiatrists have testified for the State. Dr. Grigson's 23 represents 59% of this total; Dr. Holbrook's 13 represents one-third of the total. As of 1979, Dr. Grigson claimed to have testified for the State in more than 50 Texas capital cases. See Dallas Times Herald, Sept. 30, 1979, p. 1. See also Bloom, Killers and Shrinks, The Texas Monthly, July 1978.

APPENDIX C

TESTIMONY OF THE EXPERT WITNESSES AT THE HEARING IN THE DISTRICT COURT

Petitioner called two expert witnesses, psychiatrist Fred L. Fason and psychologist Wendell Lee Dickerson. T. 7-8, 93.*/ Both were extremely critical of the testimony of Doctors Grigson and Holbrook at petitioner's trial.

Dr. Fason, who personally believes in capital punishment (T. 47), testified that no responsible physician would render a diagnosis to a reasonable medical certainty without taking a complete history, performing tests, and conducting a thorough examination. T. 24, 29-30, 34, 36, 44, 46, 48, 54, 73. He stated flatly that "from a hypothetical situation all you can arrive at is an impression but not a diagnosis to a reasonable degree of medical certainty." T. 44. He added that

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*/ Numbers preceded by "T." refer to pages of the transcript of the hearing conducted in the federal district court.

> There isn't a leading hospital in this country that would allow you to continue to practice on the staff if you made life and death decisions on that sort of inadequate data . . . other than [in] an emergency.

T. 36. Dr. Fason criticized the rendering of a diagnosis to a reasonable medical certainty in this case as "absurd," T. 36, stating that in any hospital where he was on the staff, if a doctor said that he was 100% sure of something without examining the patient "we would kick him off the staff of the hospital for his arrogance." T. 48.

Dr. Fason testified that if asked by a medical student for an opinion based upon the hypothetical question in this case, he would guess a 90% impression of sociopathy. T. 22. But he stressed that this 90% figure referred solely to an "initial impression," T. 22, 56, 72, not a diagnosis to a reasonable degree of medical certainty. T. 44. He maintained firmly that the hypothetical

question provided insufficient data for any responsible doctor "to have arrived at a diagnosis with a reasonable degree of medical certainty." T. 54.

Dr. Fason's testimony dealt almost entirely with the rendering of a diagnosis based upon a hypothetical question, and did not dwell upon the general ability of psychiatrists to predict probable future dangerousness. He did, however, state that as a psychiatrist he could not testify that there is no cure for a sociopathic condition and could not testify that a defendant sentenced to life imprisonment would present a danger to other inmates in the prision system. T. 46-47.

Dr. Dickerson flatly refused to render any diagnosis of petitioner based upon the hypothetical question: "I would decline to make any diagnostic impression of Mr. Barefoot." T. 116. He agreed that if he were asked to respond to the hypothetical

on a medical board examination he would suspect sociopathy, although he wouldn't rate the degree of suspicion as high as 90%. T. 116-117. He likened betting on the outcome of a "real diagnostic study" to "asking me to bet on a horse race." T. 116.

Dr. Dickerson further testified that, regardless of the diagnosis, psychiatrists and psychologists are incapable of predicting long-term future dangerousness. T. 95-98, 100, 108-109. He cited to several respected studies, including one of violent offenders, confirming this point. T. 94-98. He summarized the literature as follows:

> with our ability to predict at this point, we have got to recognize that we are wrong in about 2 out of every 3 of the people that we have predicted would commit a future act of violence.

T. 108.

Dr. Dickerson stressed that he was

firm in this conclusion regardless of the diagnosis in a given case. In his experience, after serving for four years as Chief of Psychological and Mental Health Services for the Texas Department of Corrections (T. 94), "probably 70 percent of the folks in there could be diagnosed as a sociopath, whatever that wastebasket diagnosis means." T. 102. Dr. Dickerson testified that even if one is 90% sure that an individual is a sociopath, one cannot be 90% sure in predicting that he will commit future acts of violence. T. 118. To the contrary, "whatever the [diagnostic] estimate was we have to recognize that the possibility of being wrong in that prediction is about 2 out of 3." T. 118.

Dr. Dickerson testified that Dr. Grigson's claim that he could predict future violence on Mr. Barefoot's part to a 100% degree of certainty "is not

supported by any ... of the objective research on the issue." T. 100. "I find absolutely no evidence in the professional literature, or even the folklore of the profession to substantiate such a claim." T. 109.

The State called two expert witnesses, psychologist George Parker and psychiatrist Richard Koons. T. 184, 207, 224. Both agreed that not all sociopaths will commit future acts of violence that are dangerous to society, T. 189, 244, and both were unwilling to endorse Dr. Grigson's absolute certainty that petitioner would commit future violent acts. T. 190, 232, 245. Dr. Parker added that the claim that petitioner was incapable of being cured and would present a danger to other prisoners could be "misleading." T. 220, 221.

Dr. Parker believed that predictions of future dangerousness become more accurate

in the case of convicted felons who have commited violent crimes, T. 199, 203, but was reluctant to fix a precise percentage as to the degree of accuracy of the prediction in this case, T. 190. He said that if he "were pressed and pressed and asked to answer that kind of question," he'd put the likelihood of future dangerousness "somewhere around 90 percent. I would say that the likelihood that he will do something in the future is much greater than it is that he would not do something dangerous in the future. Now, whether it is 70 percent or 98 percent or whatever, I don't know how you answer a question like that." T. 190-91.

Dr. Koons did not testify to any percentage, but only termed the likelihood in petitioner's case "quite high" and "very high." T. 231, 232. He further testified on cross examination that he personaly had

never diagnosed a defendant in a capital case as a sociopath based solely upon a hypothetical question, and that he did not know of any psychiatrists who had done so other than James Grigson and John Holbrook. T. 237-38.

APPENDIX D

CAPITAL CASES KNOWN TO AMICUS IN WHICH UNITED STATES COURTS OF APPEALS AND UNITED STATES DISTRICT COURTS HAVE GRANTED STAYS OF EXECUTION

I. Post-1976 Cases In The Fifth Circuit

Prior to its January 20, 1983 decision in the instant case, the Fifth Circuit had granted stays of execution in at least eleven cases of which amicus is aware. Spinkellink v. Wainwright, No. 77-2940 (Sept. 6, 1977); Jurek v. Estelle, No. 78-1374 (Feb. 28, 1978); Burns v. Estelle, No. 78-3109 (Sept. 27, 1978); Potts v. Zant, Nos. 80-7476 & 80-7477 (June 28, 1980), motion to vacate denied, 448 U.S. 904 (1980); Gray v. Lucas, No. 81-4018 (Jan. 16, 1981); Williams v. Blackburn, No. 81-3159 (March 28, 1981); Baldwin v. Blackburn, No. 81-3249 (May 8, 1981); Bevans v. Maggio and Clark v. Maggio, Nos. 81-3668 & 81-3669 (Nov. 2, 1981); Baldwin

v. Maggio, No. 82-3318 (May 24, 1982); Bass v. Estelle, No. 82-2341 (Aug. 17, 1982), motion to vacate denied, 51 U.S.L.W. 3252 (Oct. 4, 1982); O'Bryan v. Estelle, 691 F.2d 706 (5th Cir. 1982), motion to vacate denied, ___ U.S. __, No. A-396 (Oct. 29, 1982). Subsequent to the denial of a stay in this case, the Fifth Circuit has granted stays in Porter v. Estelle, No. 82-2499 (Feb. 1, 1983), and Autry v. Estelle, No. 83-2053 (Feb. 17, 1983).

II. Post-1976 Cases In All Other Circuits

The other Circuits have granted stays of execution in every capital case to come before them since 1976. Not a single stay application has been denied. The Eleventh Circuit has granted stays in at least ten cases of which we are aware: Ford v. Strickland, No. 81-6200 (Dec. 7, 1981); Finney v. Zant, No. 81-8006 (Dec. 26, 1981); Mulligan v. Zant, No. 82-8027 (Jan.

20, 1982); Antone v. Strickland, No. 82-5120 (Feb. 1, 1982); Dobbert v. Strickland, 670 F.2d 938 (11th Cir. 1982); Goode v. Wainwright, 670 F.2d 941 (11th Cir. 1982); Booker v. Wainwright, 675 F.2d 1150 (11th Cir. 1982); Shriner v. Wainwright, No. 82-5469 (April 20, 1982); Hance v. Zant, No. 82-8342 (June 9, 1982); Brooks v. Zant, No. 83-8028 (Jan. 12, 1983); See also Westbrook v. Zant, No. 81-7836 (Oct. 16, 1981), granting certificate of probable cause denied by the district court, 518 F.Supp. 1262 (M.D. Ga. 1981). The Fourth Circuit has granted stays in two such cases: Shaw v. Martin, 613 F.2d 487 (4th Cir. 1980), reenforced sub. nom. In re Shaw, No. 81-1396 (May 15, 1981); Briley v. Hutto, No. 81-6261 (April 23, 1981). And the Ninth Circuit has granted the one stay application to come before it: Harris v. Pulley, No. 82-5427 (March 12, 1982).

III. Post-1976 Cases In The District Courts

Most district courts have routinely granted stays of execution without opinion upon the filing of a federal habeas corpus petition by a death-sentenced individual. Four cases known to amicus in which opinions have been written upon the granting of such stays are Straight v. Wainwright, No. 82-607-Civ.-J-JHM (M.D. Fla. June 15, 1982) ("Absent a willingness to violate my oath of office, the undersigned is left with two choices; either grant the stay in accordance with the dictates of the law, or resign from the federal bench"); Tyler v. James, Civil Action No. C82-36A (N.D. Ga. Jan. 19, 1982) ("Requiring a person to demonstrate a substantial likelihood of prevailing on the merits in a death case is inappropriate when the applicant's life is hanging in the balance. It is not realistic to apply that standard if the loss of

human life is imminent.... A more appropriate standard ... is whether the petitioner has demonstrated to the court any likelihood of prevailing on the merits") (emphasis in original); Foster v. Strickland 515 F.Supp. 22, 24 (N.D. Fla. 1981) ("Mr. Foster's statutory and constitutional rights to petition this court for habeas corpus relief would be meaningless if he were executed while his petition is pending"); and Miller v. Lockhart, 515 F.Supp. 3, 5 (E.D. Ark. 1981)("the Court cannot conclusively state that these grounds are frivolous, without merit, and being raised solely for the purpose of delay").

IV. Pre-1976 Cases

In earlier times many courts of appeals -- especially the Fifth Circuit -- as well as many district courts routinely granted stays of executions. See, e.g., Brent v. White, 398 F.2d 503 (5th Cir.

1968); Mobley v. Dutton, 380 F.2d 14 (5th Cir. 1967); Clarke v. Grimes, 374 F.2d 550 (5th Cir. 1967); Kerrigan v. Scafati, 348 F.2d 187 (1st Cir. 1965); Whitney v. Wainwright, 339 F.2d 275 (5th Cir. 1964); United States ex rel. Goins v. Sigler, 250 F.2d 128 (5th Cir. 1957); Ellis v. Ellisor, 239 F.2d 175 (5th Cir. 1956); United States ex rel. De Vita v. McCorkle, 214 F.2d 823 (3rd Cir. 1954); Fouquette v. Bernard, 198 F.2d 96 (9th Cir. 1952)(Denman, C.J.); Thomas v. Duffy, 191 F.2d 360 (9th Cir. 1951)(Denman, C.J.); Modesto v. Nelson, 296 F.Supp. 1375 (N.D. Cal. 1969); Brown v. Brough, 248 F.Supp. 342 (D. Md. 1965); Moorer v. State of South Carolina, 240 F.Supp. 529 (E.D.S.C. 1964); Crawford v. Bailey, 234 F.Supp. 706 (E.D.N.C. 1964).

APPENDIX E

CAPITAL CASE DECISIONS BY THE UNITED STATES COURTS OF APPEALS: 1976 - Feb. 1983

* Decided in Favor of Death-Sentenced Individual

(S) State's Appeals

FIFTH CIRCUIT

1. Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), cert. denied, 440 U.S. 976 (1979)

* 2. Chenault v. Stynchcombe, 581 F.2d 444 (5th Cir. (1978)

* 3. Jurek v. Estelle, 593 F.2d 672 (5th Cir. 1979), modified en banc, 623 F.2d 929 (5th Cir. 1980)(en banc), cert. denied, 450 U.S. 1014 (1981)

* 4. Burns v. Estelle, 592 F.2d 1297 (5th Cir. 1979), adhered to en banc, 626 F.2d 396 (5th Cir. 1980)(en banc)

* (S)5. Smith v. Estelle, 602 F.2d 694 (5th Cir. 1979), affirmed, 451 U.S. 454 (1981)

* 6. Evans v. Bennett, 628 F.2d 400 (5th Cir. 1980), rehearing denied with opinion, 639 F.2d 221 (5th Cir. 1981), reversed sub. nom. Hopper v. Evans, ___ U.S. ___, 72 L.Ed. 2d 367 (1982)

* 7. Stephens v. Zant, 631 F.2d 397 (5th Cir. 1980), amended on rehearing, 648 F.2d 446 (5th Cir. 1981), question certified to Supreme Court of Georgia, ___ U.S. ___, 72 L.Ed. 2d 222 (1982)

* 8. Potts v. Zant, 638 F.2d 727 (5th Cir. 1981), cert. denied, 454 U.S. 877 (1981)

9. Williams v. Blackburn, 649 F.2d 1019 (5th Cir. 1981), adhered to en banc, 679 F.2d 381 (5th Cir. 1982) (en banc)

10. Baldwin v. Blackburn, 653 F.2d 942 (5th Cir. 1981), cert. denied, ___ U.S. ___, 72 L.Ed. 2d 475 (1982)

* 11. Granviel v. Estelle, 655 F.2d 673 (5th Cir. 1981), cert. denied, 455 U.S. 1007 (1982)

* 12. Battie v. Estelle, 655 F.2d 692 (5th Cir. 1981)

* 13. Washington v. Watkins, 655 F.2d 1346, rehearing denied with opinion, 662 F.2d 1116 (5th Cir. 1981), cert. denied, ___ U.S. ___, 72 L.Ed. 2d 474 (1982)

14. Smith v. Balkcom, 660 F.2d 573 (5th Cir. 1981), amended on rehearing, 671 F.2d 858 (5th Cir. 1982), cert. denied, ___ U.S. ___, 74 L.Ed. 2d 148 (1982)

* (S)15. Henry v. Wainwright, 661 F.2d 56 (5th Cir. 1981), vacated and remanded for reconsideration, ___ U.S. ___, 73 L.Ed. 2d 1326 (1982), adhered to on remand, 686 F.2d 311 (5th Cir. 1982)

* 16. Spivey v. Zant, 661 F.2d 464 (5th Cir. 1981), cert. denied, ___ U.S. ___, 73 L.Ed. 2d 1374 (1982); remanded with instructions, 683 F.2d 881 (5th Cir. 1982)

* (S)17. Alderman v. Austin, 663 F.2d 558 (5th Cir. 1981), adhered to en banc, 695 F.2d 124 (5th Cir. 1983)(en banc)

* 18. Mason v. Balkcom, 669 F.2d 222 (5th Cir. 1982)

* (S)19. Moore v. Estelle, 670 F.2d 56 (5th Cir. 1982), cert. denied, ___ U.S. ___, 73 L.Ed. 2d 1375 (1982)

* 20. Washington, Strickland, 673 F.2d 879 (5th Cir. 1982), modified en banc, 693 F.2d 1243 (5th Cir. 1982) (en banc)

* (S)21. Gholson v. Estelle, 675 F.2d 734 (5th Cir. 1982)

* (S)22. Ross v. Estelle, 675 F.2d 734 (5th Cir. 1982)

23. Gray v. Lucas, 677 F.2d 1086, rehearing denied with opinion, 685 F.2d 139 (5th Cir. 1982)

* 24. Jordan v. Watkins, 681 F.2d 1067, rehearing denied with opinion, 688 F.2d 395 (5th Cir. 1982)

* 25. Bell v. Watkins, 692 F.2d 999 (5th Cir. 1982)

* 26. Clark v. Louisiana State Penitentiary, 694 F.2d 75 (5th Cir. 1982) rehearing denied with opinion, ___ F.2d ___, No. 81-3792 (5th Cir. Feb. 10, 1983)

27. Bass v. Estelle, 696 F.2d 1154 (5th Cir. 1983)

EIGHTH CIRCUIT

* 28. Holtan v. Parratt, 683 F.2d 1163 (8th Cir. 1982)

NINTH CIRCUIT

29. Knapp v. Cardwell, 667 F.2d 1253 (9th Cir. 1982), cert. denied, ___ U.S. ___, 51 U.S.L.W. 3420 (Nov. 29, 1982)

* 30. Harris v. Pulley, 692 F.2d 1189 (9th Cir. 1982)

TENTH CIRCUIT

* 31. Hays v. Murphy, 663 F.2d 1004 (10th Cir. 1981)

ELEVENTH CIRCUIT

32. Ford v. Strickland, 676 F.2d 434 (11th Cir. 1982), adhered to en banc, 696 F.2d 804 (11th Cir. 1983)(en banc)

* (S)33. Young v. Zant, 677 F.2d 792 (11th Cir. 1982)

* 34. Machetti v. Linahan, 679 F.2d 236 (11th Cir. 1982)

* 35. Goodwin v. Balkcom, 684 F.2d 794 (11th Cir. 1982), modified, ___ F.2d ___, No. 81-7132 (11th Cir. Nov. 1, 1982)

* 36. Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982)

* 37. Hance v. Zant, 696 F.2d 940 (11th Cir. 1983)

38. Sullivan v. Wainwright, ___ F.2d ___, No. 81-5843 (11th Cir. Jan. 17, 1983)

39. Stanley v. Zant, ___ F.2d ___, No. 81-7615 (11th Cir. Feb. 10, 1983)

* 40. Thomas v. Zant, ___ F.2d ___, No. 81-7675 (11th Cir. Feb. 10, 1983)

41. Darden v. Wainwright, ___ F.2d ___, No. 81-5590 (11th Cir. Feb. 14, 1983)1/

1/ In addition to the 41 above-cited cases, the courts of appeals have issued four opinions which were procedurally relevant to death-sentenced

[Footnote continues on next page]

TOTALS

Fifth Circuit

Including State's Appeals

Total Number of Appeals 27

Total * 21 (77.7%)

Excluding State's Appeals

Total Number of Appeals 21

Total * 15 (71.4%)

All Circuits

Including State's Appeals

Total Number of Appeals 41

Total * 30 (73.2%)

Excluding State's Appeals

Total Number of Appeals 34

Total * 23 (67.6%)

1/ continued

individuals but did not actually decide their cases. See Gibson v. Jackson, 578 F.2d 1045 (5th Cir. 1978), cert. denied, 439 U.S. 1119 (1979); Harris v. Oliver, 645 F.2d 327 (5th Cir. 1981), cert. denied, 454 U.S. 1109 (1981); In re Wainwright, 678 F.2d 951 (11th Cir. 1982); and Felder v. Estelle, 693 F.2d 549 (5th Cir. 1982). Only the last of these was unfavorable to the death-sentenced prisoner.

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NO. 82-6080

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

THOMAS A. BAREFOOT,
Petitioner,

v.

W. J. ESTELLE, Director
Texas Department of Corrections,
Respondent.

BRIEF OF AMICUS CURIAE TEXAS CIVIL LIBERTIES UNION and AMERICAN CIVIL LIBERTIES UNION

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I

QUESTION PRESENTED

This case presents the question of what standard should be applied in granting or denying stays of execution pending disposition of appeals by death-sentenced habeas petitioners[1].

1. By focusing on this single procedural issue common to all death-sentenced habeas petitioners, Amicus Curiae does not intend to imply that we would not join with the claims relating to the merits of this particular appeal.

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MISCELLANEOUS

Advisory Committee Notes to Rule 1 of the Federal Rules of Appellate Procedure 6

NO. 82-6080

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

THOMAS A. BAREFOOT,
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v.

W. J. ESTELLE, Director
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Respondent.

BRIEF OF AMICUS CURIAE TEXAS CIVIL LIBERTIES UNION and AMERICAN CIVIL LIBERTIES UNION

INTEREST OF *AMICUS CURIAE*

The Texas and American Civil Liberties Union appear as *amicus curiae* with the written consent of both parties, given in letters which have been forwarded to the Clerk of this Court. *Amicus Curiae* are non-partisan membership organizations which have exhibited a long-standing interest in protecting Constitutional rights of the criminally accused, with participation at some level in some 26 of the over 160 death penalty cases now before Courts in the State of Texas.

Of primary importance to *Amicus Curiae* are the substantial and recurring issues relating to obtaining stays of execution in death penalty cases, and the impact that resolution of these questions will have upon the many similarly situated death-sentenced Petitioners in Texas and throughout the nation.

The process by which federal courts review a death-sentenced petitioner's first federal appeal of his federal Constitutional claims is one of vital importance. *Amicus Curiae* have an interest in insuring that first-time, non-frivolous federal habeas appeals of federal Constitutional claims are given plenary review on their merits by the Courts of Appeal.

ARGUMENT

The District Court's issuance of a certificate of probable cause to appeal Thomas A. Barefoot's habeas petition at the very least amounted to a finding that his appeal was not frivolous. *Nowakowski v. Maroney*, 386 U.S. 542, 543 (1967) [requiring consideration of merits of appeal where probable cause for appeal demonstrated]; *Carafas v. LaVallee*, 391 U.S. 234, 242; *Garrison v. Patterson*, 391 U.S. 464, 466 (1968); *Stewart v. Beto*, 454 F.2d 268, 270, n. 2 (5th Cir. 1971) [holding that certificate of probable cause amounts to a "substantial showing of the denial of (a) federal right"]; *Clements v. Wainwright*, 648 F.2d 979, 981 (5th Cir. 1981); *Gardner v. Pogue*, 558 F.2d 548, 551 (9th Cir. 1977); *Gross v. Bishop*, 377 F.2d 492 (8th Cir. 1967); *Glynn v. Donnelly*, 485 F.2d 692, 693 (1st Cir. 1973); *Dobbert v. Strickland*, 670 F.2d 938, 939 (11th Cir. 1982); Blackmun, *Allowance of In Forma Pauperis Appeals in § 2255*

and Habeas Corpus Cases, 43 F.R.D. 343, 351-2 (1968) ["(T)he test for granting a certificate of probable cause . . . requires something more than the absence of frivolity and the standard is a higher one than . . . 'good faith' "].

The Opinion of the Court of Appeals herein took apparent pain not to find Barefoot's appeal frivolous,[2] and their denial of a stay of execution left pending his non-frivolous appeal for calendaring and review on the Court's normal docket. To permit Barefoot's execution, while his non-frivolous appeal is still pending orderly Appellate review, is to render moot the questions therein presented.

Because of the unique and irrevocable nature of the penalty of death, denial of a stay of execution under these circumstances, is tantamount to dismissal of the appeal. Accordingly, where a certificate of probable cause to appeal has been issued, a stay should be granted until the merits are heard, unless Respondents demonstrate that said appeal meets the requirements for dismissal of that appeal.

> "If there is probable cause to appeal it would be a mockery of federal justice to execute [a petitioner] pending its consideration." *Foquette v. Bernard,* 198 F.2d 96, 97 (9th Cir. 1952); see: *Brooks v. Estelle,* ____U.S.____ (December 6, 1982) [Justices Brennan, Marshal and Stevens, dissenting].

An appeal may be dismissed where it is found to be frivolous and entirely without merit. *Harkins v. Eldridge,* 505 F.2d 802 (8th Cir. 1974); *Moist v. Belk,* 380 F.2d

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2. The precise language of the Court of Appeals was that it found "no patent substantial merit or semblance thereof." *Barefoot v. Estelle,* ____F.2d____, Slip Op. at p. 16 (5th Cir. Jan. 20, 1983).

721 (6th Cir. 1967), cert. den. 389 U.S. 960. See: Wright and Miller, Federal Practice and Procedure, § 3011, p. 398. And the Fifth Circuit's Local Rule 20 provides that such a determination may be made "upon the hearing of any interlocutory motion".

> "RULE 20. FRIVOLOUS AND UNMERITORIOUS APPEALS
>
> If upon the hearing of any interlocutory motion or as a result of a review under Rule 14, it shall appear to the Court that the appeal is frivolous and entirely without merit, the appeal will be dismissed." See: *U.S. v. Sheppard* (5th Cir. 1982) 688 F.2d 952, at 953; *U.S. v. Reyna* (5th Cir. 1977) 548 F.2d 1154, at p. 1155; *U.S. v. Minor* (5th Cir. 1971), 444 F.2d 521, at 523.

The hearing below, on application for stay of execution, was such an interlocutory motion and yet the Court of Appeals chose not to enter a finding of frivolousness or to dismiss Barefoot's appeal pursuant to its own procedures. To the contrary, the Court merely denied the stay without disturbing the district court's finding of probable cause to appeal. This would allow Petitioner's execution while his presumptively non-frivolous appeal was pending before them.

The presumptive effect of the district court's issuance of a certificate of probable cause was a matter briefed and argued by *Amicus* to the Court of Appeals in *Brooks v. Estelle*, ____F.2d____, Slip 2460 (5th Cir. December 6, 1982) [Amicus Texas Civil Liberties Union's Memorandum in Support of Application for Reconsideration of Order Denying Stay of Execution, filed therein].

However, this issue was not presented to this Court by Brooks' Application for Stay,[3] nor was it addressed by this Court's majority opinion therein. *Brooks v. Estelle,* ____U.S.____ (December 6, 1982).

Despite Judge Reavely's suggestion below that "since six members of the Court denied the petition for stay" in *Brooks,* the dissentors' argument "must have been rejected", this Court has often opted not to determine cases on issues not adequately presented or addressed by the parties. *Ryan v. U.S.,* 379 U.S. 61 (1964); *Pierson v. Ray,* 386 U.S. 547 (1967); *U.S. v. O'Brien,* 391 U.S. 367 (1968), reh. den. 393 U.S. 900. In any event the majority in *Brooks* did not speak to this issue, and it is now squarely before the Court.

The Court below also suggests that to give "too much weight to the district court's issuance of the certificate" would in effect abrogate the "appellate court's responsibility to decide the merits of the stay" under Rule 8, F. R. App. P. *Barefoot v. Estelle, supra,* Slip at p. 4.

However, because a petitioner's execution will render any appeal moot, not to give at least presumptive effect to such a certificate will totally eviscerate the right to appeal granted by 28 U.S.C. § 2253 where the required "certificate of probable cause" has issued. See also: Rule 22, F. R. Cr. P.

Accordingly, unless there is a finding that the issuance of the certificate of probable cause is "clearly erroneous", a stay should be granted to protect the appellate court's jurisdiction to give plenary review to the merits of that appeal.

---

3. Amicus bears considerable responsibility for having failed to seek review and present this issue to this Honorable Court in that cause.

THE INHERENT TENSION BETWEEN RULE 8 AND § 2253 IN DEATH PENALTY CASES

Rule 8 of the Federal Rules of Appellate Procedure governs the granting or denial of stays in civil cases generally. Title 28 U.S.C. § 2253 grants habeas corpus petitioners the right to appeal the denial of their § 2254 claims where a "certificate of probable cause to appeal" has been issued by the district court.

The Court of Appeal's concern for its "responsibility to decide the merits of a stay" under Rule 8, F.R.App.P., *Barefoot v. Estelle, supra,* Slip at p. 4, cannot foreclose its obligation to hear the merits of the appeal which is granted as a matter of statutory right under 28 U.S.C. § 2253.

Particularly in death penalty cases, the Congressionally granted right to appeal the denial of a § 2254 petition where a certificate of probable cause has issued, should take precedence over any inherent judicial authority to determine stays, whether prescribed by the Court's rules or not. See: *Therntron Products Inc. v. Hermansdorfer,* 423 U.S. 336 (1976) and Advisory Committee Notes to Rule 1 of the Federal Rules of Appellate Procedure which suggests that "Rules 22 through 24" are to control. Otherwise, the appellate court's determination of the stay issue under Rule 8 [which is primarily concerned with stays of execution in civil cases] may preclude the plenary review of the merits of a statutory appeal under § 2253, simply because the party at interest has been executed before his case is heard.

In *Dobbert v. Strickland,* 670 F.2d 938 (11th Cir. 1982) the Court was confronted with a similar situation

where "[T]he district court issued a certificate of probable cause under 28 U.S.C. § 2253, but denied a stay of execution of sentence". *Dobbert v. Strickland, supra,* at p. 939. The Eleventh Circuit Court of Appeals granted the stay noting that:

> "Unless the execution of sentence is stayed in this case, the issues on appeal would become moot, and defendant would never have his day in court on constitutional issues". *Dobbert v. Strickland, supra,* at p. 940.

This Court has indicated that in order to deny "the parties full opportunity to submit briefs" and argue the merits of an appeal, "despite the issuance of the certificate of probable cause", said appeal must be "frivolous". *Carafas v. LaVallee,* 391 U.S. 234, at p. 242 (1968); *Groendyke Transport, Inc. v. Davis,* 406 F.2d 1158 (5th Cir. 1969).

> "Anything less than this, as we held in *Nowakowski,* would negate the office of the certificate of probable cause." *Carafas v. LaVallee, supra,* at p. 242.

Here, as in *Dobbert v. Strickland, supra,* "[P]etitioner's application for a writ of habeas corpus is his *first* assertion of most of his constitutional arguments in *federal court*" and "[u]nless the execution of sentence is stayed in this case, the issues on appeal would become moot, and defendant would never have his day in this court on his constitutional issues." (emphasis supplied) at p. 940.

Without the benefit of briefs on the merits, the time constraints imposed by accelerated schedules and abbreviated consideration on the stay papers alone would fore-

close the courts of appeal from the "fine-tuned inquiry into the actual merits" which is required prior to imposition of the punishment of death. *Shaw v. Martin,* 613 F.2d 492 (4th Cir. 1980).

There is something special about the first federal appeal of the denial of a habeas petition raising federal constitutional issues in a death penalty case. It does not represent an attempt to relitigate an issue already decided by the same tribunal before which it is pending. *Shaw v. Martin, supra,* at p. 491. Rather such "a pending appeal in the United States Court of Appeals from the denial by the district court of the *first* petition for writ of habeas corpus" is a well-accepted, traditional avenue of post-conviction review of state court convictions which is "so well established" as to be "counted among the basic protections" accorded any accused. At p. 491. More importantly, it is a right to appellate review which should not be "mooted" by the execution of an accused against whom that ultimate punishment has been imposed.

> "To deny a stay . . . would be to prevent the following first instance decisions being made in matters now actually pending in the courts, each is an accepted, traditional avenue of post-conviction review of state court criminal convictions: 1) a pending petition for rehearing of the denial of certiorari by the Supreme Court of the United States; 2) *a pending appeal in the United States Court of Appeals from the denial by the district court of a first petition for habeas corpus;* 3) a pending post-conviction proceeding in the state court system. None of these represents an attempt to relitigate an issue already decided by the same tribunal before which it is pending. Each, as indicated, lies within avenues of review so long and so well established that they must

> be counted among the basic 'protections' with which our system has 'surrounded' all persons convicted of crime. Under these circumstances it seems imperative . . . that the jurisdiction of these courts to address the issues already regularly pending before them must be preserved against mooting by execution of the death sentence." *Shaw v. Martin, supra,* at p. 491.

This is the first federal appeal of Barefoot's first federal habeas claim.

In a death penalty case the failure to grant a stay will have the effect of divesting the court of its jurisdiction to hear a statutory appeal under § 2253, where the Petitioner is executed, even though the district court's finding of "probable cause to appeal" is not disturbed.

CONCLUSION

The anomalous result of permitting the execution of a petitioner, while his presumptively non-frivolous appeal challenging that death sentence is still pending is unconscionable and should not be tolerated by this Honorable Court.

Clear-cut, well established procedures should be set down requiring Courts of Appeal to grant stays of execution in appeals of first-time federal habeas claims where a certificate of probable cause to appeal has been issued, unless Respondents demonstrate that the issuance of such certificate was "clearly erroneous".

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above foregoing Brief of Amicus Curiae, Texas Civil Liberties Union and American Civil Liberties Union, has been mailed by certified mail, Return Receipt Requested, to Mr. Douglas M. Becker, Assistant Attorney General, P. O. Box 12548, Austin, Texas 78711, counsel for respondents and Mr. Will Gray, Attorney at Law, 2038 Lexington Street, Houston, Texas, on this the 5th day of March, 1983.

GERALD H. GOLDSTEIN

MOTION FILED
APR 5 1983

No. 82-6080

IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

THOMAS A. BAREFOOT,
Petitioner,
v.
W. J. ESTELLE, JR., DIRECTOR
TEXAS DEPARTMENT OF CORRECTIONS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* OF THE WASHINGTON LEGAL FOUNDATION AND BRIEF OF *AMICUS CURIAE* THE WASHINGTON LEGAL FOUNDATION

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QUESTIONS PRESENTED

I. Whether the standard employed by the United States Court of Appeals for the Fifth Circuit, which both assured that Petitioner's claims had been fully and fairly reviewed and accorded proper respect to the State's interest in the finality of its judgments, was appropriate.

II. Whether the introduction of psychiatric testimony on the future dangerousness of a capital defendant, implicitly approved in this Court's previous decisions, amounts to constitutional error requiring reversal.

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On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

MOTION OF THE WASHINGTON LEGAL FOUNDATION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

The Washington Legal Foundation (WLF or Foundation) moves this Court pursuant to Supreme Court Rule 42 for leave to file the annexed brief *amicus curiae* in the above-captioned proceeding in support of Respondent's position.

The Washington Legal Foundation is a non-profit corporation organized and existing under the laws of the District of Columbia for the purpose of engaging in litigation and the administrative process in matters affecting the broad public interest. WLF, which has offices in Washington, D.C. and Dallas, Texas, has more than 85,000 members and supporters throughout the United States whose interests the Foundation represents.

WLF participates in and devotes a substantial portion of its resources to matters raising criminal justice and related constitutional issues. The Foundation's concern for the physical, psychological, and financial impact crime has on its victims, their families, and society has led to the establishment of its Crime Victims Program, Death Penalty Project, and Court Watch Project. These programs are designed to advance the rights of crime victims and law-abiding citizens whose interests are too often ignored by the institutions which administer the criminal justice system. Among other activities, WLF provides legal assistance, guidance, and educational materials to the victims of violent crime and their families and participates in court cases with broad public interest implications.

As part of its Death Penalty Project, WLF has appeared as *amicus curiae* in the following death penalty cases before this Court: *Enmund v. Florida*, —— U.S. ——, 102 S. Ct. 3368 (1982); *Zant v. Stephens*, —— U.S. ——, 102 S. Ct. 1856 (1982); and *Eddings v. Oklahoma*, 455 U.S. 104 (1982). The Foundation is also presently participating in a death penalty case before the United States Court of Appeals for the Fifth Circuit, *O'Bryan v. Estelle*, No. 82-2422 (5th Cir. 1982).

In addition, WLF attorneys have testified before the U. S. Congress on capital punishment issues, *see, e.g.*, *Hearings on H.R. 5679 Regarding A Federal Death Penalty Before the Subcommittee on Criminal Justice of the House Committee on the Judiciary*, 97th Cong., 2d Sess. (1982) (statement of the Washington Legal Foundation), and regularly debate opponents of capital punishment in a variety of public forums.

In the instant case, the Washington Legal Foundation seeks to advance the interests of its members and the public by addressing some of the broader issues implicated in determining the standard to be applied in granting or denying stays of execution. The decision here will

ultimately affect the right of State legislatures, courts, and juries to impose *and* enforce capital sentences. Years have passed since Thomas Barefoot was convicted and sentenced to death for the cold-blooded murder of Carl Levin, a police officer. In this regard, the case at bar is typical of all recent capital punishment litigation in which the States' interest in the finality of their judgments has been consistently undermined by repeated federal review of the same issues.

The Washington Legal Foundation can bring to this case a perspective not presently represented. Accordingly, the Foundation respectfully requests permission to participate as *amicus curiae*. Petitioner has consented to WLF's participation. Respondent has refused its consent.

Respectfully submitted,

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April 5, 1983

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---

BRIEF OF *AMICUS CURIAE* THE WASHINGTON LEGAL FOUNDATION

INTERESTS OF *AMICUS CURIAE* WASHINGTON LEGAL FOUNDATION

The interests of *amicus curiae* Washington Legal Foundation (WLF or Foundation) are set forth in the foregoing motion for leave to file a brief *amicus curiae.*

STATEMENT OF THE CASE

In the interests of judicial economy, *amicus* adopts the statement of the case provided in Petitioner's brief.

SUMMARY OF ARGUMENT

The United States Court of Appeals for the Fifth Circuit employed an appropriate standard for denying Petitioner's motion for a stay of execution. The standard, which requires that a petitioner demonstrate a substantial federal question on which he has a fair likelihood of success, adequately protects the interests of both the defendant and the state. It permits a court to insure that defendant's claims have been subject to reasoned judgment on the merits as well as to accord the proper deference to the judgment of the state courts which have already examined the same issues. Petitioner's arguments, on the other hand, imply that state courts cannot be trusted to properly adjudicate federal constitutional claims. If upheld, they would further undermine principles of federalism and public confidence in the criminal justice system.

Petitioner's attack on the use of psychiatric testimony to predict future dangerousness at the sentencing phase of his trial also lacks merit. This Court has implicitly approved the use of such testimony and Petitioner's challenge goes to the weight, not the admissibility, of such evidence.

ARGUMENT

I. THIS COURT SHOULD AFFIRM THE FIFTH CIRCUIT'S STANDARD FOR DENYING A STAY OF EXECUTION SINCE IT FOCUSES ON THE NATURE OF A PETITIONER'S CLAIMS, ASSURES FULL AND FAIR REVIEW, AND VINDICATES PRINCIPLES OF FEDERALISM TOO OFTEN IGNORED BY FEDERAL COURTS

This Court should affirm the Fifth Circuit Court of Appeals' standard for denying a stay of execution in capital habeas corpus cases. Unlike the standard proposed by Petitioner, it both assures that a death-sentenced prisoner has received full and fair review of his claims and, equally important, accords proper respect to state judgments and state interests in the finality of those judgments.

A. The Court of Appeals, Which Found an Indisputable Absence of Merit in Petitioner's Allegations and Detailed the Reasons for Its Findings, Employed an Appropriate Standard and Procedures for Denying a Stay of Execution

The imposition of capital punishment upon a member of society is an act of the gravest import requiring special protections for defendants. *See, e.g., Gardner v. Florida*, 430 U.S. 358 (1977) (plurality opinion). While the penalty should only be enforced after full and fair review of a defendant's claims, due process does not mean endless process and the penalty should ultimately be enforced. At some point, some court must be able to declare with finality that a death-sentenced prisoner's allegations offer no meritorious grounds for yet "one more" review of his claims. As Chief Justice Burger has noted:

> It can never be less than the most painful of our duties to pass on capital cases, . . . However, there

> comes a time in every case when a court must "bite the bullet."

Eddings v. Oklahoma, 455 U.S. 104, 127 (1982) (Burger, C.J., dissenting).

The argument here, at least nominally, is over whether that point had been reached at the time Petitioner's case arrived at the Fifth Court. The Washington Legal Foundation believes that it had as an examination of the Court of Appeals disposition of the case demonstrates.

Petitioner and supporting *amici*'s attempt to paint the Fifth Circuit's action as a rushed, ill-considered judgment based upon inadequate briefing and review of the issues fails to withstand scrutiny. Petitioner's allegations—and the Fifth Circuit's treatment of them—cannot be separated from all that transpired during the prior history of this litigation. As in most death cases, Petitioner's claims were thoroughly briefed time and again and numerous state and federal courts found his trial and sentence to be free of constitutional infirmity. His motion for a stay of execution was "directed solely to the merits" of the alleged constitutional irregularities of his conviction and sentence and the "parties were afforded an unlimited opportunity to make their contentions upon the underlying merits by briefs and oral arguments." *Barefoot v. Estelle*, No. 82-1680, slip op. at 6 (5th Cir. Jan. 20, 1983). In addition, the court had the benefit and took advantage of the full trial court record. *Id.* at 16. Finally, the Court of Appeals examined each of Petitioner's contentions and detailed its reasons for concluding that they lacked merit.

The Fifth Circuit thus properly denied Petitioner a stay of execution. The standard employed by the court, which requires that a petitioner demonstrate a substantial federal question on which he has a fair likelihood of success, adequately protects the interests of all parties involved and fulfills the duty of a court "to act impar-

tially between the condemned and the state, favoring neither the state nor the condemned." *Brooks v. Estelle*, 51 U.S.L.W. 3469 (U.S. Dec. 6, 1982), *citing*, *Brooks v. Estelle*, No. 82-1613 (5th Cir. Dec. 6, 1982).

The standard permits a court to insure that meritorious appeals are subject to a reasoned judgment that a death sentence has not been imposed in violation of the Constitution. However, it also takes into account the existence of the prior briefing and argument on identical issues earlier in the case, rather than treating the motion for a stay as a discrete event involving previously unlitigated issues. In short, the court appropriately reviews the case under standards which are familiar to it and furnish guidance for its determination without acting as "super" trial court. *See O'Bryan v. Estelle*, 691 F.2d 706 (5th Cir. 1982); *Mulligan v. Zant*, 531 F. Supp. 458 (D.C. M.D. Ga. 1982).[1]

Moreover, the Fifth Circuit's treatment of the case comports with the applicable decisions of this Court. Petitioner's reliance on *Nowakowski v. Maroney*, 386 U.S. 542 (1967), *Garrison v. Patterson*, 391 U.S. 464 (1968), and *Carafas v. LaVallee*, 391 U.S. 234 (1968), is misplaced. An objective reading of those decisions indicates that the court below employed proper procedures in denying the stay of execution.

While *Nowakowski, supra*, requires that a habeas petitioner be permitted to address the merits once a court has issued a certificate of probable cause, this Court has also recognized that such an appeal may still be frivolous and that summary procedures may be available. For instance, in *Carafas, supra*, this Court reversed a denial of leave to proceed *in forma pauperis* and stated that:

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[1] In fact, the standard is similar to that followed in determining whether to grant a stay of a state court judgment pending application for certiorari in this Court. *White v. Florida*, 73 L.Ed.2d 1385, 1386 (1982) (Powell, J., in chambers).

> Nothing in the order entered by the Court of Appeals, however, indicates that the appeal was duly considered on its merits as *Nowakowski* requires in cases where a certificate of probable cause has been granted. Although *Nowakowski* does not necessarily require that the Court of Appeals give the parties full opportunity to submit briefs and argument in an appeal which, despite the issuance of the certificate of probable cause, is frivolous, enough must appear to demonstrate the basis for the court's summary action.

391 U.S. at 242. Similarly, the *Garrison* Court discussed the mandate of *Nowakowski* and held that:

> As we only recently noted in *Carafas v. LaVallee*, 391 U.S. 234, at 242, *Nowakowski does not prevent the courts of appeals from adopting appropriate summary procedures for final disposition of such cases. Carafas requires the courts of appeals to give sufficient indication that an appeal has been disposed of on the merits, but nothing in Nowakowski and nothing we say here prevents the courts of appeals from considering the questions of probable cause and the merits together, and nothing said there or here necessarily requires full briefing and oral argument in every instance in which a certificate is granted.* We hold only that where an appeal possesses sufficient merit to warrant a certificate, the appellant must be afforded adequate opportunity to address the merits, and that if a summary procedure is adopted the appellant must be informed by rule or otherwise, that his opportunity will be limited. Within this general framework, the promulgation of specific procedures is a matter for the courts of appeal.

391 U.S. at 446-447 (emphasis added). Thus, the Court of Appeals can properly consider the merits of an appeal in a summary proceeding under the applicable decisions of this Court.

That the Fifth Circuit did so in the case at bar speaks more to the merit of Petitioner's claims than it does to the validity of the determination. *Amicus* WLF agrees

with the Fifth Circuit's judgment that courts should not be prevented "from denying [a] stay if there is an indisputable absence of merit to petitioner's complaint." *Barefoot*, slip op. at 6.

B. The Fifth Circuit's Denial of a Stay Accords Appropriate Deference and Lends Finality to State Judgments

The Fifth Circuit Court of Appeals' denial of Petitioner's motion for a stay of execution manifests a concern for principles of federalism too often lacking in members of the federal judiciary in death penalty litigation. In reviewing Petitioner's claims, the court properly concluded that:

> If after all these years of study, no constitutional imperfections of substance can be found [with petitioner's conviction and sentencing], it becomes the duty of this court to deny the stay and refuse to interfere with the authorities of the State of Texas as they follow the law of that state.

Barefoot v. Estelle, No. 82-1680, slip op. at 3 (5th Cir. Jan. 20, 1983). Given the current state of capital punishment litigation in this country, the Washington Legal Foundation submits that the Fifth Circuit's balanced view of a federal court's duty deserves approval and emphasis by this Court.

The instant case offers a primary illustration of the problems which currently plague the administration of capital punishment statutes in this country and undermine public confidence in the criminal justice system. No question exists as to Petitioner's guilt or the heinous nature of the crime which led to the imposition of his capital sentence. Without reason, Petitioner shot a police officer in the head at close range—a crime so utterly reprehensible that the jury could only react with moral outrage to the harm done to societal values by its commission.

Despite the undisputed fact of Petitioner's guilt and the heinous nature of his crime, he has prevented the execution of his sentence, now almost five years old, by repeatedly raising the same issues in different courts without success. Petitioner was convicted and sentenced in the Texas district court in November, 1978. The Texas Court of Criminal Appeals affirmed his conviction and sentence and denied a motion for rehearing. *Barefoot v. State*, 596 S.W.2d 875 (Tex. Cr. App. 1980). This Court denied his petition for writ of certiorari in June, 1981. *Barefoot v. Texas*, 453 U.S. 913 (1981). Subsequently, Petitioner filed a state habeas corpus petition in the state district court. The petition was denied and the denial was affirmed by the Texas Court of Criminal Appeals. Petitioner next raised his claims in a petition for writ of habeas corpus in the federal district court. The district court held an evidentiary hearing and denied the petition in November, 1982. Now, Petitioner and supporting *amici* claim that the Court of Appeals must conduct what amounts to a *de novo* review of the claims he has repeatedly raised and lost since 1978 on the chance that a court or judge might finally agree and spare him his peers' judgment.

The point of view implicit in petitioner's arguments as well as those of supporting *amici* is that the state courts cannot be trusted to act as fair and competent forums in the adjudication of federal constitutional claims. Consequently, petitioner and *amici* place special emphasis on the fact that this is his *initial* federal habeas corpus appeal and conclude that he is constitutionally entitled to a second full federal review of all of his claims (the district court having conducted one in the first instance).[2]

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[2] The concomitant implication of Petitioner and *amici's* arguments is that the "full review" they demand must be tailored to what they, not a court, believe is "full review." One might reasonably suspect that their view of the matter has more to do with opposition to capital punishment *per se* than it does with the

No intrinsic reason exists for Petitioner to imply and this Court to sanction that federal judges are fairer or more sensitive to federal rights in capital cases. Merely because a lawyer dons the robes of a federal district or appellate judge does not magically infuse him with greater wisdom and compassion. State trial judges are well qualified to decide constitutional issues in death penalty cases and their judgment should be respected once they have found that a jury acted within constitutional bounds and the judgment has already withstood state and federal review.

It is particularly telling that Petitioner and *amici* state the truism that federal judges are sworn to uphold the United States Constitution. From this, they erroneously conclude that federal review of state claims is mandatory. However, their conclusion ignores two basic facts: (1) state court judges also take an oath to support and defend the Constitution; and (2) any commitment to uphold the Constitution is also a commitment to uphold the federalist system of government which it embodies.

Justice O'Conner has recently written that:

> If our nation's bifurcated judicial system is to be retained, as I am sure that it will be, it is clear that we should strive to make both the federal and state systems strong, independent, and viable . . . . State judges in assuming office take an oath to support the federal as well as the state constitution. State judges do in fact rise to the occasion when given the responsibility and opportunity to do so. It is a step in the right direction to defer to the state courts and

---

substance of the review actually accorded petitioner's claims. As a noted scholar recently stated about such situations:

> A phalanx of counsel . . . have . . . created a 'death-row logjam,' . . . . By one stratagem or another they have succeeded in keeping convicted murderers, guilty beyond a doubt and under State law subject to the death penalty, alive for ten years.

Berger, *Death Penalties* 6 (1982).

> give finality to their judgments on federal constitutional questions where a full and fair adjudication has been given in the state court.

O'Connor, *State Courts and Federalism in the 80's*, 22 Wm. & Mary L. Rev. 801, 814-15 (1981).

Amicus Washington Legal Foundation believes that the step recommended by then Judge O'Connor is one this Court must take. The repeated statements by this and other federal courts that capital punishment is a matter properly left to state authorities have begun to have a hollow ring as a practical matter. At some point, it must be acknowledged that the tortuous procedural path of capital cases does more to undermine the administration of criminal justice and society's confidence in it than it does to protect the rights of those who have killed fellow human beings. As matters now stand, criminals can scoff at the death penalty knowing that a sympathetic judge is likely to be found at some point in the appellate process to overturn or delay the execution of his sentence. The mockery made in recent years of society's right to express its revulsion for particular crimes by imposing capital sentences must be put to an end. The federal courts should signal that state legislatures and juries will have the power in fact as well as in word to protect their citizens as they see fit. To do otherwise violates fundamental notions of federalism and comity.

II. THE INTRODUCTION OF PSYCHIATRIC TESTIMONY ON THE FUTURE DANGEROUSNESS OF A CAPITAL DEFENDANT HAS BEEN IMPLICITLY APPROVED IN THIS COURT'S PRIOR DECISIONS AND DOES NOT CONSTITUTE REVERSIBLE ERROR

Amicus will make only a few practical points about Petitioner and supporting *amici*'s attack on the use of psychiatric testimony at the sentencing phase of his trial. The use of such evidence has been implicitly approved in the prior decisions of this Court. In *Jurek v. Texas*, 428

U.S. 262 (1976), the Court considered a vagueness challenge to requiring the jury to predict future behavior under the Texas capital punishment statute and found that the jury was qualified to make such a determination. While the Court did not reach the question of the types of evidence which are admissible, it noted that "[w]hat is essential is that the jury have all possible relevant information about the individual defendant. . . ." *Id.* at 276. *See also Lockett v. Ohio*, 438 U.S. 586 (1978); *Eddings v. Oklahoma*, 455 U.S. 104 (1982).

In *Estelle v. Smith*, 451 U.S. 454, 101 S. Ct. 1866 (1981), this Court ruled that the use of psychiatric testimony at the sentencing stage violated a defendant's rights when the testimony was based on an interview conducted without notification to defendant's counsel or warning to defendant of his right to remain silent. However, the Court examined the implications of its ruling on the state's ability to prove dangerousness under the statute and stated that "the inquiry necessary for the jury's resolution of the future dangerousness issue is in no sense confined to the province of psychiatric experts . . ." and that *Jurek* "in no sense disapprov[ed] the use of psychiatric testimony bearing on the issue of future dangerousness. . . ." 101 S. Ct. at 1878. Both of these statements indicate at least tacit approval of such testimony.

Similarly instructive is this Court's opinion in *Eddings, supra*, in which the Court focused largely upon psychiatric and psychological testimony which was offered as mitigating evidence. Based upon the conclusion that the evidence had not been properly considered, this Court overturned Eddings' capital sentence.

Surely, psychiatric testimony must be admissible in aggravation as well as in mitigation if the courts are to properly balance the interests of the defendant and the interests of the state and the public it represents. As the

courts below properly recognized, Petitioners' challenge to the use of psychiatric testimony goes to the *weight* of the testimony, not its *admissibility*. *Barefoot v. State*, 596 S.W. 2d at 887-888; *Barefoot v. Estelle*, No. 82-1680, slip op. at 7-10. Hence, Petitioner's challenge should be rejected out of hand.

CONCLUSION

The practice of granting stays of execution on an almost automatic basis simply to allow another appeal of already litigated and already reviewed issues is in need of drastic curtailment by this Court. Therefore, *amicus curiae* Washington Legal Foundation submits that this Court should affirm the ruling of the Fifth Circuit Court of Appeals in this case.

Respectfully submitted,

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April 5, 1983

No. 82-6080-CFH
Status: GRANTED

Title: Thomas A. Barefoot, Petitioner
v.
W. J. Estelle, Jr., Director, Texas Department of Corrections

Docketed:
January 24, 1983

Court: United States Court of Appeals for the Fifth Circuit

Counsel for petitioner: Gray Jr.,William E.

Counsel for respondent: Becker,Douglas M.

Entry	Date	Note	Proceedings and Orders
1	Jan 24 1983	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
5	Jan 21 1983		Application for stay of execution filed.
6	Jan 21 1983		Response thereto filed.
7	Jan 22 1983		Supplement to application filed.
8	Jan 24 1983		Referred to Court by Justice White (Conference Jan. 21, 1983)
10	Jan 24 1983		The application for stay of execution of sentence of death was presented to Justice White and referred to the Court. Treating the application as a petition for writ of certiorari before judgment, certiorari is granted. The parties are directed to brief and argue the question presented by the application, namely, the appropriate standard for granting or denying a stay of execution pending disposition of an appeal by a federal court of appeals by a death-sentenced federal habeas corpus petitioner, and also the issues on the appeal before the United States Court of Appeals for the Fifth Circuit. Execution and enforcement of the sentence of death set for Tuesday, January 25, 1983 is stayed pending the sending down of the judgment of this Court.
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12	Feb 18 1983	G	Motion of petitioner for leave to proceed in forma pauperis filed.
14	Feb 24 1983		DISTRIBUTED. February 25, 1983
18	Feb 28 1983		Motion of petitioner for leave to proceed in forma pauperis GRANTED.
19	Mar 4 1983		Brief amicus curiae of American Bar Assn. filed.
20	Mar 4 1983		Brief amicus curiae of American Psychiartic Assn. filed.
21	Mar 7 1983		Brief amicus curiae of NAACP Legal Defense & Education Fund filed.
22	Mar 8 1983		Brief amicus curiae of Texas Civil Liberties Union, et al. filed.
23	Mar 11 1983		Joint appendix filed.
24	Mar 11 1983		Brief of petitioner filed.
25	Mar 22 1983		Record filed.
26	Mar 22 1983		Certified original record & C.A. proceedings received.
27	Mar 24 1983		SET FOR ARGUMENT. Tuesday, April 26, 1983. (2nd case) 1 hour

No. 82-6080-CFH

Entry	Date	Note	Proceedings and Orders
28	Mar 17 1983		Application for stay of further proceedings in th U. S. Court of Appeals, Fifth Circuit, and in the U. S.
29	Mar 17 1983		District Court for the Western District of Texas, Waco Division filed.
30	Mar 23 1983		Response to application for stay received.
31	Mar 24 1983		Application referred to the Conference, April 1, 1983, by White, J.
32	Mar 25 1983	G	Motion of petitioner for divided argument to permit NAACP Legal Defense and Educational Fund, Inc. to present oral argument as amicus curiae filed.
33	Mar 29 1983		DISTRIBUTED. April 1, 1983. (Application for stay.)
34	Mar 29 1983		Three boxes of state court record received.
35	Mar 31 1983		Brief amicus curiae of State of Florida, et al. filed.
36	Apr 4 1983		Motion of petitioner for divided argument to permit NAACP Legal Defense and Educational Fund, Inc. to present oral argument as amicus curiae GRANTED. The application of counsel for the petitioner to stay further proceedings in the United States Court of Appeals for the Fifth Circuit, case No. 82-1680, pending the sending down of the judgment of this Court presented to Justice White and by him referred to the Court is granted. The request for a stay of further proceedings in the United States District Court for the Western District of Texas is denied.
37	Apr 1 1983		CIRCULATED.
38	Apr 5 1983	G	Motion of Washington Legal Foundation for leave to file a brief as amicus curiae filed.
39	Apr 6 1983	D	Motion of Florida for leave to participate in oral argument as amicus curiae and for additional time for argument filed.
40	Apr 8 1983	X	Brief of respondent W.J. Estelle, Jr., Director filed.
41	Apr 18 1983		Motion of Washington Legal Foundation for leave to file a brief as amicus curiae GRANTED.
42	Apr 18 1983		Motion of Florida for leave to participate in oral argument as amicus curiae and for additional time for argument DENIED.
43	Apr 19 1983	X	Reply brief of petitioner filed.
44	Apr 26 1983		ARGUED.